SUBMITTED by O.G.W.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 168

THE TIMKEN ROLLER BEARING COMPANY, PLAINTIFF IN ERROR,

vs.

THE PENNSYLVANIA RAILROAD COMPANY

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

FILED JULY 13, 1925

(31,322)

(31,322)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 599

THE TIMKEN ROLLER BEARING COMPANY, PLAINTIFF IN ERROR,

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 23, 1925

[fols.1-3] [Caption omitted]

[fol. 4] **IN COURT OF COMMON PLEAS OF CUYAHOGA COUNTY**

THE TIMKEN ROLLER BEARING COMPANY, a Corporation, Plaintiff,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, Defendant

Money Only

[Caption omitted]

PETITION—Filed May 31, 1924

Now comes the Timken Roller Bearing Company, Plaintiff, and says that it is a corporation duly chartered and organized under the laws of the State of Ohio, engaged in the business of manufacturing roller bearings and other steel products, with its principal place of business in Canton, Stark County, Ohio; that the defendant, The Pennsylvania Railroad Company, is a corporation duly chartered and organized under the laws of the State of Pennsylvania, and that it is and was at the times hereinafter mentioned engaged in business in Cleveland, Cuyahoga County, Ohio, where it has an officer and agent upon whom service of summons can be made. The plaintiff, for its cause of action against the defendant, says that on or about [fol. 5] April 10, 1920, the yard employes of the defendant went out on a strike and the defendant notified the plaintiff that it would be unable to switch freight cars for the plaintiff from the defendant's interchange tracks to the customary delivery and loading points of the plaintiff's plant at Canton, Ohio; that the defendant provided the plaintiff with a yard locomotive and from about April 13, 1920, to about September 30, 1920, the plaintiff, with the knowledge and consent and at the request of the defendant, provided the switching service above described, and throughout such period the defendant made to the plaintiff its customary charges for such switching service at its regular freight rates, which charges the plaintiff paid to the defendant in respect to each and every car switched by the plaintiff in the manner herein described; that during such period the plaintiff switched sixteen hundred and forty (1640) freight cars for the defendant and that the reasonable value to the defendant of the performance of such switching services for it by the plaintiff was Six Thousand Five Hundred Thirty-four Dollars and Sixty-one Cents ($6,534.61), computed as follows:

Wages of crew	$5,541.05
Fuel	979.85
Valve Oil	13.71
Total	$6,534.61

The plaintiff further says that the defendant, having throughout the period herein stated included in its line haul freight rate charges for such switching services and having in the case of each and every car collected from the plaintiff its charges so made, became obligated to perform for the plaintiff the services for which it so charged, and the plaintiff having performed such services for the defendant and at its request, the defendant has been unjustly enriched in the amount of $6,534.61, as above set forth; that by reason of the facts herein set forth, the defendant did impliedly agree to pay to the plaintiff the reasonable value of the switching services performed by the plaintiff for the defendant, and there is now due and owing from the defendant to the plaintiff herein the sum of Six Thousand Five Hundred Thirty-four Dollars and Sixty-one Cents ($6,534.61), which amount the defendant has failed and refused to pay to the plaintiff, although demand for the payment thereof has been made. Wherefore, the plaintiff prays judgment against the defendant in [fol. 6] the sum of Six Thousand Five Hundred Thirty-four Dollars and Sixty-one Cents ($6,534.61), together with interest thereon from the 1st day of October, 1920, together with the costs of its suit. Day & Day, Attorneys for Plaintiff.

Sworn to by James J. Laughlin, Jr.; omitted in printing.

IN COURT OF COMMON PLEAS OF CUYAHOGA COUNTY

SUMMONS AND SHERIFF'S RETURN—Filed June 6, 1924

THE STATE OF OHIO,
Cuyahoga County, ss:

To the Sheriff of Cuyahoga County:

You are commanded to notify The Pennsylvania Railroad Company, a corporation, that it has been sued by The Timken Roller Bearing Company, corporation, in the Court of Common Pleas of Cuyahoga County, and that unless it answer, by the 28th day of June, A. D. 1924, the petition of the said plaintiff against it filed in the Clerk's office of said Court, such petition will be taken as true and judgment rendered accordingly. You will make due return of this summons on the 9th day of June, A. D. 1924.

Witness George Wallace, Clerk of said Court, and the seal thereof, at the City of Cleveland, this 31st day of May, A. D. 1924.

George Wallace, Clerk, by H. L. Nicholas, Deputy Clerk.

[fols. 7-12] THE STATE OF OHIO,
Cuyahoga County, ss:

On the 2d day of June, 1924, I served this writ on the within named, The Pennsylvania Railroad Company, a corp., by handing a true and certified copy thereof, with all the endorsements thereon, to C. D. Trueman, regular freight agent for said Company, the President or other chief officers not found in my County.

C. B. Stannard, Sheriff, by Chalmer Grimm, Deputy.

Sheriff's Fees, $1.23.

Said Summons is endorsed as follows, to wit: No. 226802. Cuyahoga Common Pleas. The Timken Roller Bearing vs. The Pa. R. R. Co. Summons in action for the recovery of money only. Amount Claimed, $6,534.61, for which, with interest from the 1st day of October, 1920, judgment will be taken if you fail to answer. Returnable June 9, 1924. Day and Day, Plaintiff's Attorneys. Received June 2, 1924. C. B. Stannard, Sheriff. Returned and Filed June 6, 1924.

[fol. 13] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

No. 12565

MOTION TO DISMISS, filed Sept. 11, 1924

THE TIMKEN ROLLER BEARING COMPANY, a Corporation, Plaintiff,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, Defendant

Now comes the Pennsylvania Railroad Company, defendant herein, and moves the Court for an order dismissing the action, on the ground that the Court it without jurisdiction of the subject matter, in that the Court has no jurisdiction to adjudicate the questions presented by the plaintiff, for the following reasons:

(a) That the matters complained of in the plaintiff's petition essentially involve the making of a rate, as to which this Court has no power;

(b) The subject affects the reasonableness of rates and the reasonableness of a practice in interstate commerce, which are administrative questions, confided primarily to the Interstate Commerce Commission, and there is no allegation in the plaintiff's petition that the Interstate Commerce Commission has prescribed any rule, rate or practice which would regulate, control or govern the rights or obligations of the plaintiff and defendant in the matter complained of;

(c) That to compensate the plaintiff for the expense of the switching service set forth in plaintiff's petition would be tantamount to giving him a rebate, contrary to law—all of which is more particularly set forth in the brief which is filed herewith in support of this motion.

Squire, Sanders & Dempsey Attorneys for Defendant.

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM OPINION ON MOTION TO DISMISS—Filed Jan. 30, 1925

JONES, J.:

This matter was heard on motion to dismiss the petition, on the ground that the Court is without jurisdiction of the subject matter.

The same questions are involved as were presented in the case of Thomas P. Goodbody, as Receiver of The Hydraulic Steel Company, vs. The Pennsylvania Railroad Company, No. 12542, and the same order may be entered in this case as in the other, and for the same reasons stated therein.

Motion sustained, with exceptions to the plaintiff.

Jones, United States District Judge.

[fol. 15] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT—Jan. 30, 1925.

This case came on this day to be heard upon the motion of the defendant for an order dismissing the petition of the plaintiff and the action based thereon, on the sole ground that this Court has no jurisdiction to hear and determine the issues presented by said petition; and the motion having been argued by counsel and duly submitted to the Court, the said motion is by the Court granted.

It is, therefore, ordered and adjudged that the petition of the plaintiff herein and the action based thereon are hereby dismissed, upon the sole ground that this Court is without jurisdiction to hear and determine the subject matter of the action as set forth in said petition, for the reason that the question therein involved is one relating to the reasonableness of a charge by the defendant, as a carrier, for facilities furnished and transportation service performed by the plaintiff as a shipper, and involves a question of allowance to be made out of the whole transportation charge, based upon that part of the service performed by the shipper, as to which, so far as interstate commerce is concerned, the Interstate Commerce Commission has primary and exclusive jurisdiction, and so far as intrastate commerce is concerned, the Ohio Public Utilities Commission has primary and exclusive jurisdiction, the questions tendered by the petition being administrative and not judicial in character; and to the order and decree of the Court as above set forth, and to the action of the Court in dismissing its petition, the plaintiff excepts;

It is further ordered and adjudged that the costs in this case, taxed at -- Dollars (8--), be paid by the plaintiff, to which it likewise excepts.

O. K. Squire, Sanders and Dempsey.

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGE'S CERTIFICATE—Filed Jan. 30, 1925

In this cause, I hereby certify that the order of dismissal herein made is based solely on the ground that this Court is without juris-

diction to hear and determine the subject matter of the action as set forth in the petition, for the reason that the question therein involved is one relating to the reasonableness of a charge by the defendant, as a common carrier, for facilities furnished and transportation services performed by the plaintiff as a shipper, and involves a question of allowance to be made out of the whole transportation charge, based upon that part of the services performed by the shipper, as to which, so far as interstate commerce is concerned, the Interstate Commerce Commission has primary and exclusive jurisdiction, and in so far as intrastate commerce is concerned, the Ohio Public Utilities has primary and exclusive jurisdiction, the questions tendered by the petition being administrative and not judicial in character. This Court by its final order dismissed the suit solely for want of jurisdiction.

This certificate is made conformably to Judicial Code, Sec. 238, and the opinion filed herein is made a part of the record and will be certified and sent up as a part of the proceedings, together with this certificate.

This 30th day of January, A. D. 1925.

Paul Jones, District Judge Holding the District Court of the United States for the Northern District of Ohio.

O. K. Squire, Sanders & Dempsey.

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed April 6, 1925

And now comes The Timken Roller Bearing Company, plaintiff herein, and says:

That on or about the 30th day of January, 1925, the District Court entered a judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had prior thereto in this cause certain errors were committed, to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Day & Day, Attorneys for Plaintiff.

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed April 6, 1925

The plaintiff in this action, in connection with its petition for writ of error, makes the following assignment of errors, which it avers exists:

First. The Court erred in sustaining the defendant's motion to dismiss.

Second. The Court erred in dismissing plaintiff's suit.

Third. The Court erred in conceding that it was without jurisdiction or power to entertain the suit.

Wherefore, the plaintiff prays that said judgment be reversed.

Day & Day, Attorneys for Plaintiff.

[fols. 19 & 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed April 6, 1925

This 6th day of April, 1925, came the plaintiff, by its attorneys, and filed herein and presented to the Court its petition praying for the allowance of a writ of error and assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Supreme Court, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon its final order dismissing the suit for want of jurisdiction, and upon the plaintiff giving bond according to law in the sum of $500.00, which shall operate as a supersedeas bond.

[fol. 21] BOND ON WRIT OF ERROR FOR $500.00—Approved and filed April 6, 1925; omitted in printing

Writ of Error and Return

United States of America, ss:

The President of the United States to the Honorable the Judge of the District Court of the United States for the Northern District of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between The Timken Roller Bearing Company as plaintiff, and the Pennsylvania Railroad Company as defendant, a manifest error hath happened, to the great damage of the said The Timken Roller Bearing Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and fully and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 6th day of May next, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 6th day of April, in the year of our Lord one thousand nine hundred and twenty-five, and of the Independence of the United States of America the one hundred and forty-ninth.

B. C. Miller, Clerk of the District Court of the United States for the Northern District of Ohio, by C. A. Wilder, Deputy Clerk. (Seal of the District Court, Northern Dist. of Ohio.)

Allowed by Paul Jones, Judge of the District Court.

Return on Writ of Error

United States of America,
Northern District of Ohio, ss:

In pursuance to the command of the within writ of error, I, B. C. Miller, Clerk of the United States District Court within and for said District, do herewith transmit under the seal of said court, a full, true and complete copy of the record and proceedings of said court in the cause and matter in said writ of error stated, together with all things concerning the same, in accordance with the praecipe filed, to the Supreme Court of the United States.

There is annexed hereto and made part of this return the writ of error and citation to said defendant in error.

Witness my official signature and the seal of said court at Cleveland, in said District, this 3 day of July, A. D. 1925, and in the 149th year of the Independence of the United States of America.

B. C. Miller, Clerk, by F. J. Denzler, Deputy Clerk. (Seal of the District Court, Northern Dist. of Ohio.)

[fol. 23] CITATION—In usual form, showing service on T. M. Kirby, April 18, 1925; omitted in printing

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[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME—May 6, 1925

On application of plaintiff and for good cause shown, it is ordered that the time for filing the transcript of record in the Supreme Court of the United States be extended to June 5, 1925.

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME—June 5, 1925

On application of plaintiff and for good cause shown, it is ordered that the time for filing the transcript of record in the Supreme Court of the United States be extended to July 5, 1925.

[fol. 26] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed Apr. 6, 1925

To the Clerk:

Please prepare transcript of record for the Supreme Court of the United States in the above entitled cause, and include therein the following papers and orders:

1. Petition.
2. Summons.
3. Motion to dismiss.
4. Journal Entry of Jan. 30, 1925, granting motion to dismiss.
5. Memorandum Opinion of the Court.
6. Certificate of Judge, under Sec. 238, Judicial Code.

7. Petition for Writ of Error.
8. Assignment of Errors.
9. Order Allowing Writ of Error and Fixing Supersedeas Bond.
10. Supersedeas Bond.
11. Clerk's Certificate to Transcript of Record.
12. Writ of Error.
13. Clerk's Return to Writ of Error.
14. Praecipe for Transcript of Record.
15. Orders extending time for filing transcript of record.
16. Citation.

Day & Day, Attorneys for Plaintiff.

[fol. 27] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

NORTHERN DISTRICT OF OHIO, ss:

I, B. C. Miller, Clerk of the District Court of the United States for said District, do hereby certify that the annexed and foregoing pages contain a full, true and complete copy of the final record, including the petition for writ of error, assignment of errors and bond on writ of error, and all proceedings in said cause, in accordance with the praecipe for transcript filed by plaintiff in error, the originals of which are now in my custody as Clerk of said Court.

There is also annexed to and transmitted with such transcript of record the writ of error and the citation issued and allowed in this case.

In testimony whereof, I have hereunto signed my name and affixed the seal of said Court, at Cleveland, in said District, this 3 day of July, A. D. 1925, and in the 149th year of the Independence of the United States of America.

B. C. Miller, Clerk, by F. J. Deuzler, Deputy Clerk. (Seal of the District Court, Northern Dist. of Ohio.)

[fol. 28] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION BY PLAINTIFF IN ERROR OF PARTS OF RECORD TO BE PRINTED, WITH NOTICE OF AND PROOF OF SERVICE—Filed July 25, 1925

The plaintiff-in-error, by Day & Day, its attorneys, presents the following statement of errors upon which plaintiff-in-error intends to rely in the above case, and of the parts of the record which plaintiff-in-error thinks necessary for the consideration thereof:

First. The Court erred in sustaining the defendant's motion to dismiss.

Second. The Court erred in dismissing plaintiff's suit.

Third. The Court erred in holding that it was without jurisdiction or power to entertain the suit.

The plaintiff-in-error also states that it considers the following parts of the record necessary for the consideration of the errors upon which it intends to rely, to-wit:

1. Petition.
2. Summons.
3. Motion to dismiss.
4. Journal Entry of Jan. 30, 1924, granting motion to dismiss.
5. Memorandum Opinion of the Court.
6. Certificate of Judge, under Sec. 238, Judicial Code.
7. Petition for Writ of Error.
8. Assignment of Errors.
9. Order allowing Writ of Error and Fixing Supersedeas Bond.

[fol. 29] 10. Supersedeas Bond.

11. Clerk's Certificate of Transcript of Record.
12. Writ of Error.
13. Clerk's Return to Writ of Error.
14. Praecipe for Transcript of Record.
15. Stipulation for Record.
16. Citation.
17. Order of Enlargement of time for docketing of case and filing of record.

Respectfully submitted, Day & Day, by Rufus S. Day, 617 Cuyahoga Building, Cleveland, Ohio, Attorneys for Plaintiff-in-Error.

[fol. 30] IN SUPREME COURT OF THE UNITED STATES

To the defendant in error and Messrs. Squire, Sanders & Dempsey, attorneys for the defendant-in-error in the above-entitled cause:

We herewith serve upon the defendant-in-error above named, by delivery to you of a copy of the statement of errors upon which the plaintiff-in-error in the above entitled cause intends to rely, and of the parts of the record which plaintiff-in-error thinks necessary for the consideration thereof.

Dated: July 23, 1925.

Day & Day, 617 Cuyahoga Building, Cleveland, Ohio, by Rufus S. Day, Attorneys for Plaintiff-in-Error.

Service of the foregoing notice this 23rd day of July 1925, is hereby acknowledged, also service of the statement therein referred to.

Squire, Sanders and Dempsey, Attorneys for Defendant-in-Error.

[fol. 31] [File endorsement omitted.]

Endorsed on cover: File No. 31,322. N. Ohio D. C. U. S. Term No. 599. The Timken Roller Bearing Company, plaintiff in error, vs. The Pennsylvania Railroad Company. Filed July 13th, 1925. File No. 31,322.

In the Supreme Court of the United States

OCTOBER TERM, 1925.

No. [redacted] 168

THE TIMKEN ROLLER BEARING COMPANY,
Plaintiff in Error,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR PLAINTIFF IN ERROR.

LUTHER DAY,
RUFUS S. DAY,
1728 Engineers Bank Bldg.,
Cleveland, Ohio,
Counsel for Plaintiff in Error.

DONALD W. KLING,
Of Counsel.

In the Supreme Court of the United States

October Term, 1925.

No. 599.

The Timken Roller Bearing Company,
Plaintiff in Error,

vs.

The Pennsylvania Railroad Company,
Defendant in Error.

In Error to the District Court of the United States for the Northern District of Ohio.

BRIEF FOR PLAINTIFF IN ERROR.

Luther Day,
Rufus S. Day,
1728 Engineers Bank Bldg.,
Cleveland, Ohio,
Counsel for Plaintiff in Error.

Donald W. Kling,
Of Counsel.

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Authorities and Statutes Cited.

In the Supreme Court of the United States

October Term, 1925.

No. 599.

The Timken Roller Bearing Company,
Plaintiff in Error,

vs.

The Pennsylvania Railroad Company,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

The opinion of the District Court in this case is not reported.

The jurisdiction of this Court is invoked upon the following grounds: This case was originally filed in the Court of Common Pleas of Cuyahoga County, Ohio, and was thereafter removed to the United States District Court for the Northern District of Ohio by the defendant upon the ground of diversity of citizenship; in the District Court, the defendant filed a motion to dismiss the action, based solely upon the ground that the Court was without jurisdiction of the subject matter thereof for the following reasons:

> "(a) That the matters complained of in the plaintiff's petition essentially involve the making of a rate, as to which this Court has no power;
>
> (b) The subject affects the reasonableness of rates and the reasonableness of a practice in interstate commerce, which are administrative questions, confided primarily to the Interstate Commerce Commis-

sion, and there is no allegation in the plaintiff's petition that the Interstate Commerce Commission has prescribed any rule, rate or practice which would regulate, control or govern the rights or obligations of the plaintiff and defendant in the matter complained of;

(c) That to compensate the plaintiff for the expense of the switching service set forth in plaintiff's petition would be tantamount to giving him a rebate, contrary to law,—all of which is more particularly set forth in the brief which is filed herewith in support of this motion." (R. 3)

The motion to dismiss was sustained by the District Court (R. 3 and 4), and the District Judge signed and filed a certificate stating that his order of dismissal was based solely upon the ground that the District Court was without jurisdiction to hear and determine the subject matter of the action

"for the reason that the question therein involved is one relating to the reasonableness of a charge by the defendant, as a common carrier, for facilities furnished and transportation services performed by the plaintiff as a shipper, and involves a question of allowance to be made out of the whole transportation charge, based upon that part of the services performed by the shipper, as to which, so far as interstate commerce is concerned, the Interstate Commerce Commission has primary and exclusive jurisdiction, and in so far as intrastate commerce is concerned, the Ohio Public Utilities Commission has primary and exclusive jurisdiction, the questions tendered by the petition being administrative and not judicial in character. This Court by its final order dismissed the suit solely for want of jurisdiction." (R. 5)

The jurisdiction of this Court is invoked under Section 238 of the Judicial Code which, as it stood at the time the judgment in the District Court was rendered, provided:

"Appeals and writs of error may be taken from the district courts, including the United States District Court for Hawaii and the United States District court for Porto Rico, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

This section was amended by the Act of February 13, 1925, which became effective three months thereafter, or on May 13, 1925. The judgment in the District Court was rendered on January 30, 1925, and the writ of error in this case was allowed on April 6, 1925. This case is one in which the jurisdiction of the District Court was in issue and which was dismissed by that Court solely for want of jurisdiction and by it certified to this Court for decision pursuant to Section 238, as above quoted.

STATEMENT OF FACTS.

There was no trial in this case in the District Court. The only pleadings before the Court were the petition of the plaintiff (R. 1 and 2) and the defendant's motion to dismiss for want of jurisdiction, the grounds of which have already been set forth (R. 3). Inasmuch as the only facts involved were those contained in the petition, we set forth a copy of the petition verbatim, as follows:

"Now comes the Timken Roller Bearing Company, Plaintiff, and says that it is a corporation duly

chartered and organized under the laws of the State of Ohio, engaged in the business of manufacturing roller bearings and other steel products, with its principal place of business in Canton, Stark County, Ohio; that the defendant, The Pennsylvania Railroad Company, is a corporation duly chartered and organized under the laws of the State of Pennsylvania, and that it is and was at the times hereinafter mentioned engaged in business in Cleveland, Cuyahoga County, Ohio, where it has an officer and agent upon whom service of summons can be made. The plaintiff, for its cause of action against the defendant, says that on or about [fol. 5] April 10, 1920, the yard employes of the defendant went out on a strike and the defendant notified the plaintiff that it would be unable to switch freight cars for the plaintiff from the defendant's interchange tracks to the customary delivery and loading points of the plaintiff's plant at Canton, Ohio; that the defendant provided the plaintiff with a yard locomotive and from about April 13, 1920, to about September 30, 1920, the plaintiff, with the knowledge and consent and at the request of the defendant, provided the switching service above described, and throughout such period the defendant made to the plaintiff its customary charges for such switching service at its regular freight rates, which charges the plaintiff paid to the defendant in respect to each and every car switched by the plaintiff in the manner herein described; that during such period the plaintiff switched sixteen hundred and forty (1640) freight cars for the defendant and that the reasonable value to the defendant of the performance of such switching services for it by the plaintiff was Six Thousand Five Hundred Thirty-four Dollars and Sixty-one Cents ($6,534.61), computed as follows:

Wages of crew	$5,541.05
Fuel	979.85
Valve Oil	13.71
Total	$6,534.61

The plaintiff further says that the defendant, having throughout the period herein stated included in its line haul freight rate charges for such switching services and having in the case of each and every car collected from the plaintiff its charges so made, became obligated to perform for the plaintiff the services for which it so charged, and the plaintiff having performed such services for the defendant and at its request, the defendant has been unjustly enriched in the amount of $6,534.61, as above set forth; that by reason of the facts herein set forth, the defendant did impliedly agree to pay to the plaintiff the reasonable value of the switching services performed by the plaintiff for the defendant, and there is now due and owing from the defendant to the plaintiff herein the sum of Six Thousand Five Hundred Thirty-four Dollars and Sixty-one Cents ($6,534.61), which amount the defendant has failed and refused to pay to the plaintiff, although demand for the payment thereof has been made. Wherefore, the plaintiff prays judgment against the defendant in [fol. 6] the sum of Six Thousand Five Hundred Thirty-four Dollars and Sixty-one Cents ($6,534.61), together with interest thereon from the 1st day of October, 1920, together with the costs of its suit."

Observe:

(1) The services were rendered by the shipper for the carrier at the instance and request of the carrier, during a strike by the carrier's employees, that is, during an emergency, and after the carrier had advised the shipper it would be unable to perform the services;

(2) The shipper paid the carrier its customary charges at its regular freight rates for all of the switching done in the use by the carrier of the locomotive maintained by the shipper;

(3) The carrier having been paid by the shipper its full freight rate charges for all switching services per-

formed in the use of the locomotive maintained by the shipper, has become unjustly enriched by reason thereof in the sum of $6,534.61, which amount it has impliedly agreed to pay to the shipper.

The District Court, in dismissing the petition of the plaintiff for want of jurisdiction, filed the following memorandum opinion:

JONES, J.:

"The defendant moves for an order dismissing this suit on the ground that the Court is without jurisdiction of the subject matter.

Plaintiff has sued to recover the reasonable value of switching service performed by plaintiff for the defendant, under an implied contract, during the strike of the railroad yard employees, or from April 10th to December 1st, 1920. The petition alleges that the defendant notified the plaintiff of its inability to perform the service of switching freight cars for the plaintiff from defendant's interchange tracks to the customary delivery and unloading places of the plaintiff's plant at Canton, Ohio; that during that period the plaintiff, with the knowledge and consent and at the request of the defendant, provided the switching service, and was charged therefor and paid to the defendant its customary charges for such switching service, at the regular freight rates, for each car thus switched by the plaintiff during that period.

The defendant claims by its motion that the subject matter of the suit involved the making of a rate for service arising out of transportation; that it is a claim for an allowance rather than one for damages and, therefore, an administrative matter, not subject to judicial inquiry and determination; that Section 15 (8) of the Interstate Commerce Act provides the plaintiff's remedy.

Plaintiff, however, contends that the petition does not allege that the service was performed in interstate

commerce and that that [fol. 16] Act has no application.

I think it immaterial whether the service was performed in interstate or intrastate commerce, if the subject is the reasonableness of a rate, charge or allowance for transportation service rendered, because, if intrastate, the laws of Ohio regulate such matters. The character of the question controverted is, in my opinion, one having to do with the reasonableness of the charge for the facilities furnished and transportation service performed by the shipper (owner of property transported); that is, the allowance to be made or the compensation to be paid by the carrier for such service. It is not a question of damages for the exaction of an unreasonable or discriminatory charge, neither is it one of damage to property, or the failure to comply with a legal duty. In the absence of any published schedule or tariff covering the subject, it involves an equitable allowance to be made out of the whole transportation charge, based upon the part of the service performed by the plaintiff. That the service may have been rendered under abnormal conditions, or in an emergency, does not, in my opinion, change its character.

From a consideration of all of the authorities cited and discussed by counsel in their briefs, I have come to the conclusion that the determination of this controversy is an administrative function and not a judicial one, and that the jurisdiction of the commissions established by law for that purpose is primary and exclusive.

The motion of the defendant will, therefore, be sustained, and exceptions allowed to the plaintiff."

Observe that this opinion is based upon the following grounds:

(a) That it is immaterial whether the services were performed in interstate or intrastate commerce;

(b) That if the services were performed in intrastate commerce "the laws of Ohio regulate such matters";

(c) That the petition of the plaintiff and the questions thereby presented involve "the reasonableness of the charge for the facilities furnished and transportation service performed by the shipper (owner of property transported), that is, the allowance to be made or the compensation to be paid by the carrier for such service";

(d) That the right of the plaintiff to recover for the services rendered by it for the defendant is not affected by the fact that such services were performed in an emergency;

(e) That the determination of the question presented by the plaintiff's petition involves the exercise of a function administrative and not judicial, as to which exclusive jurisdiction is by law conferred upon commissions (the Court having in mind the Interstate Commerce Commission as to interstate commerce and the Ohio Public Utilities Commission as to intrastate commerce).

ARGUMENT.

In seeking a reversal of the judgment of the District Court in this case, we rely upon the following propositions:

(1) It not appearing in the plaintiff's petition whether the services performed by it for the defendant were performed in interstate or in intrastate commerce, the District Court could properly have dismissed the plaintiff's petition for want of jurisdiction only in the event (a) that the Interstate Commerce Commission has exclusive jurisdiction if or, at least, to the extent that the services were performed in interstate commerce, and (b) the Public Utilities Commission of Ohio has exclusive jurisdiction if the services were performed in intrastate commerce; and the Court could not properly assume that the services were in fact performed exclusively in either interstate or intrastate commerce;

(2) If it be assumed for the sake of the argument that all of the services performed by the plaintiff for the defendant related to interstate commerce exclusively, the District Court had jurisdiction to determine and decide the questions presented by the plaintiff's petition, the questions presented being judicial and not administrative in character and the jurisdiction of the Interstate Commerce Commission not being exclusive;

(3) If it be assumed for the sake of the argument that the services performed by the plaintiff for the defendant related exclusively to intrastate commerce, then the District Court had jurisdiction to determine and decide the questions presented by the plaintiff's petition and the Ohio Public Utilities Commission has no jurisdiction in the premises.

We shall proceed to notice these propositions in their order.

I.

IT NOT APPEARING IN THE PLAINTIFF'S PETITION WHETHER THE SERVICES PERFORMED BY IT FOR THE DEFENDANT WERE PERFORMED IN INTERSTATE OR IN INTRASTATE COMMERCE, THE DISTRICT COURT COULD PROPERLY HAVE DISMISSED THE PLAINTIFF'S PETITION FOR WANT OF JURISDICTION ONLY IN THE EVENT (A) THAT THE INTERSTATE COMMERCE COMMISSION HAS EXCLUSIVE JURISDICTION IF THE SERVICES WERE PERFORMED IN INTERSTATE COMMERCE, AND (B) THE PUBLIC UTILITIES COMMISSION OF OHIO HAS EXCLUSIVE JURISDICTION IF THE SERVICES WERE PERFORMED IN INTRASTATE COMMERCE: AND THE COURT COULD NOT PROPERLY ASSUME THAT THE SERVICES WERE IN FACT PERFORMED EXCLUSIVELY IN INTERSTATE COMMERCE.

The defendant's motion to dismiss was based upon the assumption that the services performed by the plaintiff for the defendant related exclusively to interstate commerce, although it is true that the District Court decided that it had no jurisdiction regardless of whether the services were rendered in interstate or intrastate commerce. The petition does not disclose whether the services were performed in interstate or intrastate commerce, or both, and the services themselves were of such a character that they might have been performed in either or both kinds of commerce. In the determination of the questions presented in this Court it cannot be assumed that the services performed related solely to either interstate or intrastate commerce to the exclusion of the other, and the judgment of the District Court should be reversed if it is here decided that the District Court would have jurisdiction in the event the services related exclusively to intrastate commerce even though it would have no jurisdiction if the services were performed solely in interstate commerce.

II.

IF IT BE ASSUMED FOR THE SAKE OF THIS ARGUMENT THAT ALL OF THE SERVICES PERFORMED BY THE PLAINTIFF FOR THE DEFENDANT RELATED TO INTERSTATE COMMERCE EXCLUSIVELY, THE DISTRICT COURT HAD JURISDICTION TO DETERMINE AND DECIDE THE QUESTIONS PRESENTED BY THE PLAINTIFF'S PETITION, THE QUESTIONS PRESENTED BEING JUDICIAL AND NOT ADMINISTRATIVE IN CHARACTER AND THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION NOT BEING EXCLUSIVE.

(a) Under the statement of facts contained in the petition we contend that there is here presented a case which does not involve any question relating to a rate or a rebate nor is any complaint made of an unjust or unreasonable charge or any illegal discrimination upon the part of the carrier against the shipper. The carrier was fully paid according to its scheduled rates for all the services that were performed and the use of the instrumentalities provided by the shipper were so provided in an emergency due to a switchman's strike and then only after the carrier had informed the shipper that it would itself be unable to perform the services in question. We contend that the question here presented is not an administrative question at all but is one purely judicial in character requiring only a determination of the right of a shipper to be paid for its services, and, of course, the amount to be paid therefor. The shipper having paid the full transportation charge to the carrier no question of rates is presented, and his services having been rendered during a strike only after the carrier had confessed its own inability to perform them, no other shipper's rights being involved, no question of discrimination is raised. Nor is there presented a situation requiring or even permitting the publication of the charge to be paid to shipper by the carrier before the services

herein described were performed, the circumstances and conditions incident to the doing of the work making that impracticable if not impossible. The question is one wholly between the shipper and the carrier arising upon the peculiar and unusual facts disclosed and its determination does not involve the rights of other shippers or of other carriers or the exercise of any administrative function for their protection or control. While the form of the petition is not that usually adopted for the presentation of a claim for damages, nevertheless it is our contention that such is the real nature of the plaintiff's claim, and if that be true, the question presented is judicial and not administrative in character and the courts have jurisdiction to try and determine the issues presented by the plaintiff's petition.

(b) We contend that by the provisions of the Commerce Act, itself, the shipper is not required to present to the Commission his claim against the carrier for compensation for services rendered and instrumentalities provided by it and to obtain from the Commission an order fixing the maximum charge to be made therefor as a condition precedent to the filing by him of an action in court to recover the value of the services rendered or damages based upon the refusal and failure of the carrier to pay therefor. The provision of the Commerce Act involved is Section 15, Paragraph 13, as follows:

Interstate Commerce Act, Sec. 15:

"(13) If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of

the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

Observe the provision as to the power of the Commission is that it *may*, either upon the complaint of the carrier or upon its own motion, determine the maximum charge to be paid to the shipper by the carrier. By this language, the power of the Commission is not exclusive but permissive and should not be construed as depriving the courts of their jurisdiction to determine claims for damages or compensation, by the shipper against the carrier for services performed or for instrumentalities provided by the former.

This question was involved and decided by this Court in *Interstate Commerce Commission vs. Diffenbaugh*, 222 U. S. 42, wherein this Court said:

"The law does not attempt to equalize fortune, opportunities, or abilities. On the contrary, the act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in § 15; the only restriction being that he shall pay no more than is reasonable, and *the only permissive element being that the Commission may determine the maximum in case there is complaint* (or now, upon its own motion. Act of June 18, 1910, chap. 309, § 12, 36 Stat. at L. 539, 553). As the carrier is required to furnish this part of the transportation upon request, he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it. In this case there is no complaint that the rate out of which the allowance is made is unreasonable, and it is admitted that ¾ of a cent barely would pay the cost of the service rendered, without any reasonable profit to Peavey & Company,

for the work. See *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 54 L. ed. 112, 30 Sup. Ct. Rep 66." (Italics ours.)

We submit that this language, quoted with approval by this Court in *United States vs. Baltimore & Ohio Railroad Co.*, 231 U. S. 274, is squarely applicable to the case at bar. And if it be argued that a claim by a shipper against a carrier for compensation under the Section above quoted must first be submitted to the commission, we reply that such is the requirement of the law only in the event that the shipper's claim is of such a character as to involve in its determination questions administrative in character relating to rates, rebates or kindred subjects, and that the doctrine has no application here for the reason that the question here presented has to do only with the rights and duties of a single shipper and a single carrier arising upon a state of facts which does not involve any other shipper or any other carrier, and hence does not invite or require the regulatory action or control of the Commission.

(c) We invite the Court's attention to the provisions of Section 9 and of Section 22 of the Act as supporting our contention that the District Court had jurisdiction to consider and determine the questions presented by the plaintiff's petition. Section 9 is as follows:

> "Any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any District Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which

one of the two methods of procedure herein provided for he or they will adopt, etc."

The pertinent provisions of Section 22 are:

> "And nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies; provided, that no pending litigation shall in any way be affected by this Act * * *."

While the plaintiff's petition does not follow the form usually adopted in actions for damages, we submit that it may nevertheless be considered such upon the theory that the plaintiff, the shipper, having paid to the defendant, the carrier, the full amount of its scheduled and published charges, has been damaged to the extent that its own expenses incurred in rendering services and providing instrumentalities for the defendant remain unpaid. And if the plaintiff's claim be regarded as one for breach of an implied contract, there being no question involved requiring administrative action by the Commission, the plaintiff has his common law remedy by an action against the defendant on such contract. These views, we believe, are in accord with the decisions of this Court upon the general subject.

In *Pennsylvania Railroad Company vs. Puritan Coal Mining Company*, 237 U. S. 121 (1915) this Court considered Section 9 of the Act, the authorities interpreting Section 9, and the proviso of Section 22, and laid down the doctrine that unless the question involved was purely an administrative question, a shipper not only had the option granted in Section 9 of complaining to the Commission or bringing suit in a United States court, but also had the right to sue in a State court for recovery of his damages. In that case, the Pennsylvania Railroad was sued by the Puritan Company in the State Court of Pennsylvania for damages

caused by the railroad's failure to furnish the Puritan Company with cars for the shipment of coal to points within and without the State, and for failure of the Railroad Company to distribute cars in accordance with its own rule for the allotting of cars in time of shortage. The Railroad Company moved to dismiss the case on the ground that the State court was without jurisdiction. The court dismissed the motion. The case was heard and judgment for damages entered. The supreme Court of Pennsylvania affirmed the judgment and the Railroad Company brought the case to this Court, asserting that (a) the determination of the proper basis of car distribution was a matter calling for the exercise of the administrative power of the Interstate Commerce Commission; (b) that no court had jurisdiction of the suit until after a ruling by the Interstate Commerce Commission; (c) that no suit for damages against an interstate carrier could be brought for failure to deliver cars or for improper car distribution except in a United States court. This Court affirmed the judgment entered below and after citing Sections 8 and 9 of the Interstate Commerce Act, said (page 129):

> "But Sections 8 and 9, standing alone, might have been construed to give the Federal Courts exclusive jurisdiction of all suits for damages occasioned by the carrier violating any of the old duties which were preserved and the new obligations which were imposed by the commerce act. And, evidently, for the purpose of preventing such a result, the proviso to Section 22 declared that 'nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.'
>
> That proviso was added at the end of the statute, not to nullify other parts of the act, or to defeat rights or remedies given by preceding sections, but to preserve all existing rights which were not inconsistent with those created by the statute. It was also intended

to preserve existing remedies, such as those by which a shipper could, in a state court, recover for damages to property while in the hands of the interstate carrier; damages caused by delay in shipment; damages caused by failure to comply with its common-law duties, and the like. But for this proviso to Section 22 it might have been claimed that, Congress having entered the field, the whole subject of liability of carrier to shippers in interstate commerce had been withdrawn from the jurisdiction of the state courts, and this clause was added to indicate that the commerce act, in giving rights of action in Federal courts, was not intended to deprive the state courts of their general and concurrent jurisdiction. *Galveston, H. & S. A. R. Co. vs. Wallace*, 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205.

Construing, therefore, Sections 8, 9 and 22 in connection with the statute as a whole, it appears that the act was both declaratory and creative. It gave shippers new rights, while at the same time preserving existing causes of action. It did not supersede the jurisdiction of state courts in any case, new or old, where the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission, or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive. Compare *Abilene Case*, 204 U. S. 439-446, 51 L. ed. 558-561, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; *Robinson v. Baltimore & O. R. Co.*, 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114; 36 Stat. at L. 551 (15), chap. 309, Comp. Stat. 1913, Section 8583; 38 Stat. at L. 220, chap. 32."

* * *

"But if the carrier's rule, fair on its face, has been unequally applied, and the suit is for damages occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits, though against an in-

terstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or Federal courts." * * *

"In the distribution of cars to coal companies it might be necessary to determine whether account should be taken of system cars, foreign cars, private cars, and the company's own coal cars. In many cases the determination of such an issue would call for the exercise of the regulating function of the Commission. That was true in *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 304, 312-314, 57 L. ed. 1494, 1497, 1498, 33 Sup. Ct. Rep. 938. There the plaintiff admitted that it had received all the cars to which it was entitled under the carrier's rule, but insisted that the rule itself was unreasonable and unjustly discriminatory, since it took no account of private and foreign cars controlled by the mining company. The reasonableness of the rule was a matter for the Commission.

The present suit, however, is not of that nature. It is not based on the ground that the Pennsylvania Railroad's rule to distribute in case of car shortage on the basis of mine capacity was unfair, unreasonable, discriminatory, or preferential. But, as shown above, the plaintiff alleged it was damaged by reason of the carrier's failure to furnish it with cars to which it was entitled. In support of that issue of fact the plaintiff relied on the carrier's own rule as evidence. That rule, and the carrier's distribution sheets, showed the number of cars to which the plaintiff, the Berwind-White Company, and other coal companies in the district, were each entitled. The evidence further showed that the plaintiff did not receive that number of cars to which by rule it was thus entitled. So that on the trial there was no administrative question as to the reasonableness of the rule, but only a claim for damages occasioned by its violation in failing to furnish cars. *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U. S. 197, 57 L. ed. 1451, 33 Sup. Ct. Rep. 893. The state and Federal courts had concurrent jurisdiction

of such claim against an interstate carrier without a preliminary finding by the Commission."

The same doctrine is announced by this Court in *Illinois Central Railroad Co. vs. Mulberry Hill Coal Co.*, 238 U. S. 275. And see also *Kansas City Southern Railway Co. vs. Wolf*, 272 Fed. 681 (8 C. C. A.).

(d) It was contended by opposing counsel in the court below that the plaintiff could not recover against the defendant upon the facts set forth in its petition because there was no published schedule or tariff covering the amount of compensation to the shipper by the carrier for the services performed and the instrumentalities provided, and comment upon this phase of the case is made by the District Court in its opinion. This proposition involves a consideration of the following language in Section 6 of the Act:

"No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: *Provided*, That wherever the word 'carrier' occurs in this Act it shall be held to mean 'common carrier.'

We contend that under the facts here disclosed the fixing of the charge to be paid the shipper by the carrier and the publication of a schedule embodying such charge are matters not required and, in fact, impracticable if not impossible to procure. In our view of the law, the charge to be made by a shipper against a carrier for the use of a locomotive provided by the shipper and operated and maintained at its expense, is not an allowance within the meaning of the Act. There is no provision in the Act requiring the fixing by the Commission of the charges to be paid the shipper by the carrier for services rendered or instumentalities provided by the shipper, nor for the publication of a schedule relating to such charges, before the shipper can be compensated by the carrier for such services or instrumentalities. The right of the shipper to recover against the carrier under the facts disclosed in the case at bar, that is, for services rendered or instrumentalities provided by it, is governed by paragraph 13 of Section 15 of the Act hereinbefore noticed, and there is an utter absence of any provision therein, requiring the fixing of the charges to be paid the shipper or the publication of a schedule to that effect as a condition precedent to an action by the shipper against the carrier to recover damages or reasonable compensation because of services rendered or instrumentalities provided by the shipper. The language of this section is to the effect that

> "The Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as a maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

Clearly, this language contemplates a situation in which the shipper, upon more than one occasion and as a matter of more or less continuous practice, has been rendering services or been providing instrumentalities for a carrier or carriers for which it, the shipper, desires to make a charge; and the language is permissive and enables the shipper if it desires so to do, to have the Commission fix a maximum rate to be charged the carrier or carriers and to have its services paid for by the carriers within that maximum rate pursuant to an order to that effect made by the Commission upon complaint being made to it or upon its own initiative. There is nothing in this language which, reasonably construed, can have the effect of requiring the shipper to have the charge to be made by it against the carrier determined and published in advance of the rendering of services or the providing of instrumentalities for the carrier. Nor would it be, in a case of emergency such as is here presented, a practical rule for the shipper's charges to be thus fixed and published in advance. Surely, the law does not contemplate that if the shipper, acting in an emergency such as a strike, or a flood, or a fire, or some unexpected or unforeseen casualty which threatens his property, renders services or provides instrumentalities for the carrier, that before he can charge the carrier therefor, the amount of charge must be first fixed and then published before the services are rendered or the instrumentalities are used. We believe the fact disclosed in the case at bar that the shipper is seeking to be compensated for services rendered and instrumentalities provided in an emergency, it having paid the carrier the full amount of its regular scheduled charges, is one of considerable importance in arriving at the proper decision to be made upon the questions presented.

(c) We do not believe that there is any substantial foundation for the contention that if the plaintiff is per-

mitted to recover against the defendant upon the facts alleged in this petition, the result will be a granting of a rebate by the defendant to the plaintiff, in violation of the Commerce Act. The rebate provisions of the Act are found in Section 2 as follows:

> "Sec. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

The facts are all before the Court, and upon this branch of the argument we submit, without enlarging upon the subject, that there is not here presented by any possible construction a case in which there is involved a claim in response to which the plaintiff, the shipper, would be permitted to pay to the defendant, the carrier, any less compensation for the services rendered by the carrier than it received from other shippers for similar transportation services.

III.

IF IT BE ASSUMED, FOR THE SAKE OF THIS ARGUMENT, THAT THE SERVICES PERFORMED BY THE PLAINTIFF FOR THE DEFENDANT RELATED EXCLUSIVELY TO INTRASTATE COMMERCE, THEN THE DISTRICT COURT HAD JURISDICTION TO DETERMINE AND DECIDE THE QUESTIONS PRESENTED BY THE PLAINTIFF'S PETITION AND THE OHIO PUBLIC UTILITIES COMMISSION HAS NO JURISDICTION IN THE PREMISES.

(a) As we have already observed, the plaintiff's petition does not disclose whether the services rendered and the instrumentalities provided by it related to interstate or to intrastate commerce. This being true, the judgment of the District Court should be reversed if it had jurisdiction to determine the questions presented by the petition assuming that the services were rendered and the instrumentalities provided related solely and exclusively to intrastate commerce. No reasonable contention can be made that the Interstate Commerce Commission has any jurisdiction whatsoever of the questions here presented if we assume that they relate entirely and exclusively to intrastate commerce. By Section 1 of the Commerce Act itself it is expressly provided that its provision shall not apply to the transportation of passengers or property or to the receiving, delivering, storage or handling of property wholly within one state. In *Hocking Valley Railway Co. vs. New York Coal Co.*, 217 Fed. 727, (6th CCA) and *Texas Etc. Railway Company vs. Thompson*, 288 Fed. 167, (5th CCA), it was in effect decided that the Interstate Commerce Commission had no jurisdiction to consider and determine questions involving railroad operations where it did not expressly appear in the pleadings or the facts of the case that the work involved was in fact performed in interstate as distinguished from intrastate commerce.

Assuming that the services were performed and the instrumentalities provided by the plaintiff related exclusively to intrastate as distinguished from interstate commerce, the question presented is whether the District Court had jurisdiction to consider the claims presented by the plaintiff's petition or the Public Utilities Commission of Ohio, which is the Commerce Commission of that State, had exclusive jurisdiction so to do. We contend that an examination of the Statutes of Ohio creating and defining the powers and jurisdiction of the Public Utilities Commission, construed in the light of the Ohio decisions in so far as they are applicable, discloses not only that the Commission does not possess exclusive jurisdiction to consider and determine the questions here presented, but that it has no jurisdiction at all so to do.

In *New Bremen vs. The Public Utilities Commission*, 103 O. S. 23, it was directly held that the Commission is an administrative board and has only such authority as is conferred upon it by the statute creating it and, see also, to the same effect,

Cincinnati vs. Public Utilities Commission, 91 O. S. 331;

Cincinnati vs. Public Utilities Commission, 96 O. S. 270;

Cincinnati vs. Public Utilities Commission, 96 O. S. 554;

Telephone Co. vs. Public Utilities Commission, 97 O. S. 202;

Railway & Terminal Co. vs. Public Utilities Commission, 98 O. S. 287;

Railway & Light Co. vs. Public Utilities Commission, 98 O. S. 303;

Traction Co. vs. Public Utilities Commission, 98 O. S. 305;

Washington vs. Public Utilities Commission, 99 O. S. 70;

Oak Harbor vs. Public Utilities Commission, 99 O. S. 275;

Railroad vs. Public Utilities Commission, 100 O. S. 225;

Lima vs. Public Utilities Commission, 100 O. S. 416;

Gas Co. vs. Public Utilities Commission, 102 O. S. 678;

(adhered to on rehearing, *Gas Co. vs. Public Utilities Commission*, 102 O. S. 688).

We have presented in the case at bar a claim made by a shipper to recover against the carrier for services rendered and instrumentalities provided by the shipper. The question as to whether or not the Ohio Public Utilities Commission has any jurisdiction to consider and determine such a claim when made by the shipper, must be answered by an examination of the provisions of the statutes by which the Commission was created, and if such jurisdiction is not conferred upon the Commission by the statutes it does not exist. An examination of the statutes creating the Commission and defining its powers and jurisdiction, discloses, beyond any question at all, that there is no provision therein contained conferring upon the Commission jurisdiction or power to consider claims made by the shipper against the carrier of the character here presented. And there is no provision in the statutes creating the Commission similar to Paragraph 13 of Section 15 of the Interstate Commerce Act heretofore considered. As establishing the truth of this proposition and to enable the Court to compare the provisions in the Interstate Commerce Act and the Ohio Public Utilities Act respectively, we set them forth in full as follows:

"*Interstate Commerce Act*, Sec. 15:

(13) If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

"*Ohio General Code*, Sec. 566:

No railroad shall demand, charge, collect or receive from a person, firm or corporation a less compensation for the transportation of property or for a service rendered or to be rendered by it in consideration of such person, firm or corporation furnishing a part of the facilities incident thereto; but nothing herein shall prohibit a railroad from procuring facilities or services incident to transportation and paying a reasonable compensation therefor."

Observe that while in the Interstate Commerce Act provision is expressly made for the Commission, either upon complaint being made to it, or on its own initiative, to determine what is a reasonable charge to be paid by the carrier to the shipper for services rendered or instrumentalities provided by the shipper, there is an absolute and utter absence of such provision in the Ohio Public Utilities Act. And Section 566 Ohio General Code, above quoted, being the only provision that relates at all to the rendering of services or the furnishing of facilities by the shipper to the carrier, the conclusion is irresistible that the Ohio Commission has no power or jurisdiction what-

soever to hear and determine claims of the character here presented by the plaintiff as a shipper against the defendant as a carrier. No other conclusion can be reached in view of the well established proposition elementary in itself and announced by the Ohio decisions to the effect that the Ohio Commission, having been created by statute, has no power or jurisdiction except such as has been conferred upon it by such statute. There is no provision by which the Ohio Commission may fix the maximum charge to be paid the shipper and make an order for its payment. If a shipper should file with the Ohio Commission a claim for damages or compensation for services rendered or instrumentalities provided the carrier, there is no provision in the Act conferring upon the Commission jurisdiction to hear and determine the shipper's claim in that regard.

(b) The provisions of the Ohio Act relating to rebates and discriminations are as follows:

> "Section 504. Each railroad shall furnish reasonably adequate service and facilities. The charges made for any service rendered or to be rendered in the transportation of passengers or property, or for any service in connection therewith, or for the receiving, switching, delivering, storing or handling of such property, shall be reasonable and just. Every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."
>
> "Section 535. If, upon an investigation under the provisions of this chapter, the commission finds that any existing rate or rates, fares, charges or classifications, any joint rate or rates, or any regulation or practice affecting the transportation of persons or property, or service in connection therewith, are unreasonable or unjustly discriminatory, or that any service is inadequate, it shall determine and by order fix a reasonable rate, fare, charge, classification, joint rate, regulation, practice or service to be

imposed, observed and followed in the future, in place of that so found to be unreasonable, unjustly discriminatory, or inadequate, as the case may be. A certified copy of each such order shall be delivered to an officer or station agent of the railroad affected thereby, and such order shall of its own force take effect and become operative thirty days after service thereof."

"Section 566. No railroad shall demand, charge, collect or receive from a person, firm or corporation a less compensation for the transportation of property or for a service rendered or to be rendered by it in consideration of such person, firm or corporation furnishing a part of the facilities incident thereto; but nothing herein shall prohibit a railroad from procuring facilities or services incident to transportation and paying a reasonable compensation therefor."

And as to the publication of schedules, etc.

"Section 505. Each railroad shall print in plain type and file with the commission, within a time fixed by the commission, schedules which shall be open to public inspection, showing all rates, fares and charges for transportation of passengers, and property, any service in connection therewith, which such railroad has established and which are in force at such time between all points in this state upon its line, or any line controlled or operated by it."

"Section 510. No railroad shall charge, demand, collect or receive a greater or less compensation for the transportation of passengers or property, or for any service in connection therewith, than is specified in such printed schedules, including schedules of joint rates, as being then in force. The rates, fares and charges named therein shall be the lawful rates, fares and charges until they are changed as provided in this chapter."

Without attempting to reargue as applicable to the Ohio Commerce Act the propositions we have already sub-

mitted to the Court arising under the Interstate Commerce Act, we adopt them and contend that the case at bar does not present any question involving rates, rebates, discriminations or the exercise by the Ohio Commission of an administrative function.

(c) In support of our contention that the fact that the plaintiff's services were rendered and its instrumentalities provided the defendant in an emergency, *that is, a strike* of the defendant's employees, is important if not controlling in the determination of the questions here presented, we call the Court's attention to a decision by the Supreme Court of Ohio in the case of *B. & O. Railroad Co. vs. Armstrong etc. Co.*, 99 O. S. 163, in which the syllabus reads:

> "A special contract between a common carrier and a shipper, made in view of an unusual flood for the immediate and necessary removal of perishable goods beyond the reach of the flood, is not *per se* void unless its terms are unjust, unreasonable or discriminatory in their nature or in their operation."

In that case, the plaintiff delivered to the railroad company a quantity of wheat with the agreement and understanding that the railroad company would "safely and immediately transport and deliver same over its railroad to high ground out of reach of water," and it was averred that the railroad company failed to perform such agreement upon its part, and that the plaintiff's wheat was destroyed by reason of a flood. The defendant, the railroad company, interposed, among others, the following defense:

> "Under the laws of Ohio regulating intrastate commerce, the defendant is prohibited from making or entering into any contract for the shipment of freight not provided for or authorized by its published tariffs; * * * that the contract or agreement alleged in each of the causes of action in the petition herein was not authorized or provided for by its said tariffs or

schedules, and that said alleged contracts or agreements were illegal, null and void and in violation of Sections 505, 506, 508, 510, 513, 564 and 567 of the General Code of Ohio."

The Court, in disposing of this defense, said:

> "These sections relate to the duties of a common carrier, and their purpose is to prevent discrimination between different members of the public as to charges for services as a common carrier. The service in this case was not as a common carrier, but as an uncommon carrier, in an uncommon situation, an emergency under uncommon circumstances, for which the milling company was liable for a reasonable and just charge."

And then the Court says:

> "But even as to a special contract between the carrier and the shipper, such special contract is not *per se* void, unless it exhibits an unjust and unreasonable charge discriminatory in its nature."

This case is authority in Ohio not only for the proposition that it is not necessary to fix and publish tariffs for services rendered in an emergency, but also for the further proposition that a special contract between a carrier and a shipper is not *per se* void, in the absence of an unreasonable charge or discrimination, even though it is not made in accordance with fixed and published tariffs.

(e) *The identical question here presented, has been decided by the Court of Common Pleas of Cuyahoga County, Ohio, in favor of the contentions herein made by the plaintiff in error.* As we have already seen, the plaintiff's petition against the defendant in the case at bar was filed in the Court of Common Pleas of Cuyahoga County, Ohio, and from there removed to the District Court by the defendant upon the ground of diversity of citizenship. At the same time that the plaintiff filed its petition against the defendant herein in the State court, it also filed in the

same court a petition against the Wheeling & Lake Erie Railway Company, an Ohio corporation, such action being No. 226801 in the Court of Common Pleas of Cuyahoga County, Ohio. Thereupon the defendant, The Wheeling & Lake Erie Railway Company, the State court having jurisdiction of the parties, filed a motion to dismiss the plaintiff's action for want of jurisdiction, basing such motion on the identical grounds set forth by the defendant in its motion to dismiss for want of jurisdiction filed in the District Court in the case at bar. Upon the defendant's motion to dismiss being considered by the Common Pleas Court in the *Wheeling & Lake Erie* case, it was by the Court overruled, the following entry being made: "Motion by defendant to dismiss action. Motion overruled. Defendant excepts." This ruling was made by the State court on January 23, 1925, while the judgment of the District Court in the case at bar was rendered January 30, 1925. Upon the attention of the State court in the *Wheeling & Lake Erie* case being called to the fact that the same question there decided was pending in the Federal courts, this entry was made in the State court. "Federal case pending. Re-hearing if necessary." The Court of Common Pleas wrote no opinion in support of its decision in the case before it, but it was there contended, upon brief by counsel for the plaintiff, that the motion to dismiss for want of jurisdiction should be overruled because, it not appearing in the petition whether the services rendered and instrumentalities provided related to interstate or to intrastate commerce, it could not be assumed that they related to interstate commerce exclusively. It may, therefore, be safely assumed that the State court, in arriving at its conclusion to overrule the defendant's motion to dismiss for want of jurisdiction, considered the law which would be

applicable to the facts presented if the services were rendered and the instrumentalities provided in intrastate commerce, and decided that question in favor of the plaintiff. While, of course, the decision of the Ohio trial court is not, in any event, conclusive upon this Court, and, perhaps, not even persuasive so far as questions relating to interstate commerce are involved, nevertheless we submit that this decision is of value to the plaintiff as supporting its contentions here made insofar as they relate strictly to intrastate commerce.

Respectfully submitted,

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DONALD W. KLING,
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In the Supreme Court of the United States

OCTOBER TERM 1926.
No. 168.

THE TIMKEN ROLLER BEARING COMPANY,
Plaintiff in Error,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR DEFENDANT IN ERROR.

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In the Supreme Court of the United States

October Term 1926.
No. 168.

The Timken Roller Bearing Company,
Plaintiff in Error,

vs.

The Pennsylvania Railroad Company,
Defendant in Error.

In Error to the District Court of the United States
For the Northern District of Ohio.

BRIEF FOR DEFENDANT IN ERROR.

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In the Supreme Court of the United States

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Plaintiff in Error,

vs.

The Pennsylvania Railroad Company,
Defendant in Error.

In Error to the District Court of the United States
For the Northern District of Ohio.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE ISSUES.

The sole issue before this Court is whether the District Court was in error in holding that it did not have jurisdiction to hear and to determine to what extent, if any, the plaintiff in error might recover from the defendant in error a sum in the nature of an allowance for transportation services performed by plaintiff in error in connection with and incident to the line haul service rendered it by the defendant in error.

The decision of this issue depends upon the answers to the following questions:

1. Is the allowance sought to be recovered such an allowance as is contemplated by the terms of Section 15 of the Interstate Commerce Act as to interstate commerce, and by the terms of Section 566 of the General Code of Ohio as to intrastate commerce?

2. If such is the case—

(a) Is the jurisdiction of the Interstate Commerce Commission exclusive as to such allowance in connection with interstate commerce; and

(b) Is the jurisdiction of the Public Utilities Commission of Ohio exclusive as to such allowance in connection with intrastate commerce,

so as to vest the primary and exclusive jurisdiction in the Interstate Commerce Commission or in the Public Utilities Commission of Ohio, as the case may be, of any issue involving the reasonableness of the allowance contended for?

ARGUMENT.

We will first discuss the issues stated above in connection with which we shall notice particularly those points raised in plaintiff in error's brief which appear to have a bearing upon the issues.

THE ALLOWANCE SOUGHT TO BE RECOVERED IS SUCH AN ALLOWANCE AS IS CONTEMPLATED BY SECTION 15 OF THE INTERSTATE COMMERCE ACT INSOFAR AS IT RELATES TO INTERSTATE COMMERCE AND WITHIN THE PURVIEW OF SECTION 566 OF THE OHIO GENERAL CODE INSOFAR AS IT RELATES TO INTRASTATE COMMERCE.

The sections referred to are quoted as follows:

Interstate Commerce Act, Sec. 15, par. 13.

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by

appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

Ohio General Code, Section 566.

"Sec. 566. Illegal concessions.—No railroad shall demand, charge, collect or receive from a person, firm or corporation a less compensation for the transportation of property or for a service rendered or to be rendered by it in consideration of such person, firm or corporation furnishing a part of the facilities incident thereto; but nothing herein shall prohibit a railroad from procuring facilities or service incident to transportation and paying a reasonable compensation therefor."

As stated in plaintiff in error's brief, no evidence was received by the lower court upon the allegations contained in the plaintiff's petition. Consequently for the purpose of this argument only, the consideration of the facts of the case is limited to those disclosed in the petition of plaintiff. The petition is set out verbatim at pages 3, 4 and 5 of plaintiff in error's brief and will not be repeated here.

It will be noted from the petition that the allowance claimed by plaintiff relates to switching of freight cars by the plaintiff between "the defendant's interchange tracks" and "the customary delivery and loading points of the plaintiff's plant at Canton, Ohio," at a time when "the yard employes of the defendant went out on a strike and the defendant notified the plaintiff that it would be unable to switch freight cars for the plaintiff." It appears that the service in question was such as was customarily performed by the defendant for the plaintiff. It further appears from the petition that the charges for such switching service were included in defendant's line-haul freight rate. Since the switching service in question was dependent upon the line-haul transportation per-

formed by defendant it seems clear that the service was one "connected with such transportation" within the meaning of Section 15 of the Interstate Commerce Act as related to interstate commerce or was "incident to transportation" within the purview of Section 566 of the Ohio General Code insofar as intra-state commerce may be involved, for which the railroad (defendant) in either case is authorized to pay a reasonable compensation. In fact, plaintiff in error at page 20 of its brief admits that the services in question fall within the terms of Section 15 of the Interstate Commerce Act.

In *Fulton Bag and Cotton Mills vs. American Railway Express Co.*, 288 Fed. 854, 857, a similar situation was held to be within the terms of Section 15 of the Interstate Commerce Act.

THE SERVICE BEING ONE CONNECTED WITH OR INCIDENT TO TRANSPORTATION, THE QUESTION OF WHAT IS A REASONABLE CHARGE OR ALLOWANCE THEREFOR IS WITHIN THE EXCLUSIVE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION INSOFAR AS THE SERVICE MAY RELATE TO INTERSTATE COMMERCE AND WITHIN THE EXCLUSIVE JURISDICTION OF THE PUBLIC UTILITIES COMMISSION OF OHIO INSOFAR AS THE SERVICE RELATES TO INTRASTATE COMMERCE.

It will be noted from Section 15 of the Interstate Commerce Act that:

1. "the charge and allowance * * * shall be no more than is just and reasonable," and

2. "the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered."

Insofar as charges and allowances for services relating to interstate commerce are involved, the plaintiff in error does not contend in its brief that the Interstate Com-

merce Commission does not have jurisdiction to determine what shall constitute a reasonable maximum charge and allowance for the service performed but does contend that the Commission's jurisdiction is not exclusive; hence that the plaintiff is free to bring the issue before either the Commission or a court as it may choose.

Plaintiff in error's contention appears to be based upon the use of the word "may" in Section 15, i. e., "the Commission may * * * determine what is a reasonable charge * * * for the services so rendered," contending that the authority of the Commission is permissive only (see page 13, plaintiff in error's brief). Plaintiff in error there cites and quotes certain language of this Court in *Interstate Commerce Commission vs. Diffenbaugh*, 222 U. S. 42, in support of its contention. However, it is submitted that a reading of the case shows that it is not an authority on the point stated. In that case the Interstate Commerce Commission had refused an allowance to the shipper and the action was brought to enjoin the Commission's order refusing to grant the allowance. The position of the Commission was that it was within its jurisdiction to refuse to grant any allowance for a service performed by the shipper falling within the definition of service connected with the transportation provided for in Section 15 of the Act. This Court, however, in disposing of the matter held that the statute contemplates that if the carrier received services from an owner of property transported it was obligated to pay for them, a right which the Commission could not destroy, "the only permissive element being that the Commission may determine the maximum in case there is complaint (or now upon its own motion)."

When the facts of the case are considered the defendant in error believes it is obvious that the Court had no intention of holding that the claimant in that case or here might lay his complaint before the courts rather than be-

fore the Commission. It is pertinent to note that in the particular case cited the aggrieved shipper *first* laid his complaint before the Commission and it was not until the Commission had disposed of it that he sought the relief of the courts in an action in no respect conflicting with the jurisdiction of the Commission to hear and determine the amount of the charge or allowance as provided under Section 15 of the Act, nor did the Court undertake to determine the reasonableness of the allowance to which the shipper was entitled.

The plaintiff in error at page 14 of its brief cites *United States vs. Baltimore & Ohio Railroad Co.*, 231 U. S. 274 as "squarely applicable to the case at bar." Examination of that case shows that not only does it not support the plaintiff in error's case as to jurisdiction but in fact supports the contention of defendant in error, as witness the fact that the court declined to pass upon certain phases of the case, there being nothing in the record showing that such a contention was passed upon by the Commission or considered by that body. (L. c., 297.)

Not only do the cases cited by the plaintiff in error fail to support its contention as to jurisdiction but the cases decided both by this Court and by the lower Federal courts establish clearly the exclusive jurisdiction of the Commission primarily to determine the maximum reasonable charge or allowance when the question arises.

In the first place, defendant in error submits that the cases support its contention that the Commission's jurisdiction under Section 15 is exclusive although the word "may" is therein used. As an illustration it will be observed that Section 9 of the Act provides in substance:

> "That any person or persons claiming to be damaged by any common carrier subject to the provisions

of this Act *may* either make complaint to the Commission as hereinafter provided for, or *may* bring suit * * * in any district or circuit court of the United States of competent jurisdiction." (Italics ours)

The wording here employed is even broader than that in Section 15 and would appear to afford the shipper permission to pursue his complaint before either the Commission or a district court of the United States as he might choose. But this Court has repeatedly held that where the measure of the recovery involves the determination of the reasonableness of a charge, rule or practice subject to the Act that the shipper must primarily invoke redress through the Interstate Commerce Commission.

Texas and Pacific Railway Co. vs. Abilene Cotton Oil Co., 204 U. S. 426;

Robinson vs. Baltimore & Ohio Railroad Co., 222 U. S. 506;

Mitchell Coal & Coke Co. vs. Penna. R. R. Co., 230 U. S. 247, 255;

Nor. Pac. Ry. Co. vs. Solum, 247 U. S. 477;

Great Northern Railway Co., et al. vs. Merchants Elevator Co., 259 U. S. 285, 291.

The reasoning of this Court in arriving at the above conclusion is worthy of note. The following is taken from *Texas and Pacific Railway Co. vs. Abilene Cotton Oil Co.*, 204 U. S. 426, 439:

"When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because unless the requirement of a uniform standard of rates be complied with it would result that violations of the stat-

ute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the Commission, would give rise to a change of the schedule rate and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Com-

mission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed no reason can be perceived for the enactment of the provision endowing the administrative tribunal, which the act created, with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible."

Nor does the requirement apply "only in the event that the shipper's claim is of such a character as to involve in its determination questions administrative in character * * *," as contended by plaintiff in error at page 14 of its brief. Observe the following declaration of this Court on the question in *Great Northern Railway Co. et al. vs. Merchants Elevator Company*, 259 U. S. 285, 291:

"Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised

> is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts."

Nor can the plaintiff in error avoid the point of the argument underlying these decisions by its allegation at page 14 of its brief:

> "* * * that the doctrine has no application here for the reason that the question here presented has to do only with the rights and duties of a single shipper and a single carrier arising upon a state of facts which does not involve any other shipper or any other carrier, and hence does not invite or require the regulatory action or control of the Commission."

Even if this statement were true, it would not affect the question of jurisdiction here involved. That the statement made is not a fact, however, is evident from the brief itself. The Court's attention is invited to pages 30 and 31 of plaintiff in error's brief where it is said:

> "At the same time that the plaintiff filed its petition against defendant herein in the state court it also

filed in the same court a petition against the Wheeling and Lake Erie Railway Company, an Ohio corporation, such action being No. 226,801 in the Court of Common Pleas of Cuyahoga County, Ohio."

The defendant in error might also add that similar actions are pending on behalf of Thomas P. Goodbody, as Receiver of The Hydraulic Steel Company, against the Pennsylvania Railroad Company and against The Wheeling and Lake Erie Railway Company, the former pending before this Court as Case No. 178, October Term, 1926, and the latter still pending in the Court of Common Pleas of Cuyahoga County, Ohio, as No. 226,639.

With such a situation it must be apparent that the reasoning underlying the decision of this Court in *Texas and Pacific Railway Company vs. Abilene Cotton Oil Company*, 204 U. S. 426, quoted above, is most cogent in the present case. The sustaining of plaintiff in error's contention would permit the invocation of the jurisdiction of at least three separate and independent tribunals involving the same or similar issues under circumstances which this Court has held would make uniformity of consideration and disposition a practical impossibility.

While the defendant in error submits that the cases decided by this Court thoroughly support its contention as to the jurisdiction of the Interstate Commerce Commission, the exact question came before the United States District Court for the Northern District of Texas in *Fulton Bag and Cotton Mills vs. American Railway Express Co.*, 288 Fed. 854, where it was held that the question must be first submitted to the Commission before an action may be maintained in court. The following is quoted from Page 856 of that case:

"The question presented is quite difficult of solution, because of the hairlike distinction between an action for damages, which is cognizable in this forum,

and the making of a rate for a service performed, or the granting of relief which would be, in effect, a declaration as to what would be reasonable for a given service, or as to what is or would be a reasonable practice. The mind hesitates when it is called upon to determine whether a compensation for a failure to perform a duty by a carrier is, under the legislation now being scrutinized, recoverable in court, because 'damages,' or is nonrecoverable in court until the national rate-making body has first acted thereon.

"It will be noted that the shipper performed for himself a service that the carrier was bound by law to perform, and that the shipper paid to the carrier the rate which entitled it to the service from the carrier which it performed itself. In other words, the defendant was bound to call for the merchandise at the defendant's (plaintiff's) factory and transport it to its terminal for continued shipment on its journey to the destination, but that, instead of doing so, it ignored the calls of the plaintiff, and the plaintiff was compelled, in order to keep its contract with its customers, to transport the merchandise from its factory to the defendant's depot, and to pay for such initial transportation, so that the packages would be on hand for the remainder of the journey to their destination. Amended section 15 (8) of the Interstate Commerce Act contains the following provision:

(The court here quoted Section 15 (8) of the Act.)

"As the delivery services rendered by the plaintiff included the very things that the defendant, the carrier, would have had to do for itself, as an incident of the transportation, if they had not been done by the shipper, it does not seem to be fairly open to dispute that those services, in part, at least, were such as are within the meaning of the words of the provision, 'any service connected with such transportation.' It would seem that the effect of the provision is to make the charge for such service subject to the Commission. *O'Keefe v. U. S.*, 240 U. S. 294, 36 Sup. Ct. 313, 60 L. Ed. 651; *Mitchell Coal Co. vs. Pennsylvania Railroad*

Co., 230 U. S. 247, 33 Sup. Ct. 916, 57 L. Ed. 1472; *Ellis v. I. C. C.*, 237 U. S. 434, 35 Sup. Ct. 645, 59 L. Ed. 1036; *Manufacturers' Railway Co. v. U. S.*, 246 U. S. 457, 38 Sup. Ct. 383, 62 L. Ed. 831; *Finkbine Lumber Co. v. Gulf Railway Co.* (C. C. A.) 269 Fed. 933."

And on page 859 the court says:

"Of course, one cannot claim the right to come into court under the act and at the same time ignore a provision of the act which denies the right to recover in a court for the very thing for which he is seeking recovery. Without even intimating that there is or was any understanding between the plaintiff and the defendant that the plaintiff should perform the service that it did perform, yet to permit a recovery for it would open a door through which the carrier could prefer a shipper, or destroy a shipper, or give a rebate to a shipper or discriminate against a shipper. It would permit to be done the very thing that the Congress has been so properly solicitous to see should not be done. Manifestly the carrier in the present case would not be permitted to pay any sum, large or small, reasonable or unreasonable, to the shipper, for that portion of the haul that the shipper provided for. What the parties themselves could not do voluntarily —what they could not peaceably and nonlitigiously do —certainly this court would not compel nor order them to do. That voluntary act which would be unlawful may not be made lawful by the command of the law."

That the defendant in error's view of the question is generally recognized is evident by the fact that the reports of the Commission contain a multitude of cases adjudicating such allowances whereas the court decisions may be searched in vain for such an adjudication as here sought. While not controlling and perhaps not persuasive, the fact is nevertheless significant. The case pending in the Common Pleas Court of Cuyahoga County, Ohio, alluded to at page 30 of plaintiff in error's brief can not be considered

as an exception as will be shown in the comments upon that case at a later point in this brief.

Sections 9 and 22 of the Interstate Commerce Act do not invest the courts with jurisdiction where the Commission has been authorized to determine the issue or where the issue involves the reasonableness of a carrier's rate, rule or practice.

The effort of plaintiff in error to sustain its contention under Sections 9 and 22 of the Act to Regulate Commerce may be answered briefly by referring to one or two of the cases decided by this Court and cited elsewhere in this brief.

In *Texas and Pacific Railway Co. vs. Abilene Cotton Oil Co.*, 204 U. S. 426, 446, where the same contention here made by plaintiff in error (Brief, page 15) was disposed of by this Court, it was said:

> "This clause, however, can not in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act."

Again, in *Robinson vs. Baltimore & Ohio Railroad Co.*, 222 U. S. 506, 511, this Court said:

> "Of course, the provision in Section 22 as also the provision in Section 9, must be read in connection with other parts of the Act and be interpreted with due regard to its manifest purpose, and, when that is done, it is apparent that neither provision recognizes or implies that an action for reparation, such as is here sought, may be maintained in any court, Federal or state, in the absence of an appropriate finding and order of the Commission."

While the latter case dealt with an action for reparation, the latitude allowed shippers in such cases under Sec-

tions 9 and 22 is unquestionably much greater than that allowed shippers in actions for allowances where Sections 9 and 22 must necessarily be read in connection with Section 15 under which the shipper's right to an allowance is insured.

The published tariffs of a carrier are binding on the parties and the courts, and may not be changed or departed from except as provided by law.

The service claimed to have been performed by the plaintiff is directly dependent upon the line-haul service performed by the defendant in transporting shipments to and from the plaintiff's plant. Any charges made by defendant for switching or spotting service for which plaintiff claims reimbursement were included in the line-haul freight rate of the defendant. (See petition quoted at page 5 of plaintiff in error's brief.) No separate tariff charge for this service is alleged by plaintiff, and for the purpose of this case, it may be assumed that no tariff was filed or published specifying an allowance for spotting service. Any allowance which might be made plaintiff would, therefore, come out of the line-haul freight rate of the defendant. Although the petition does not so state, it is to be presumed that the line-haul freight rates were published and maintained in accordance with the law and were consequently the legal rates. *Mecker et al. vs. Lehigh Valley R. Co.*, 162 Fed. 354, 359.

Paragraph 7 of Section 6 of the Interstate Commerce Act and Section 510 of the Ohio General Code provide as follows:

Interstate Commerce Act, Section 6, par. 7:

"No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, un-

less the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Ohio General Code, Section 510:

"No railroad shall charge, demand, collect or receive a greater or less compensation for the transportation of passengers or property, or for any service in connection therewith, than is specified in such printed schedules, including schedules of joint rates, as being then in force. *The rates, fares and charges named therein shall be the lawful rates, fares and charges until they are changed as provided in this chapter.*" (Italics ours)

Note that under both of these provisions the carrier (defendant) may not charge, demand, collect or receive a greater or less or different compensation for the transportation of passengers or property than is specified in its tariffs filed and in effect at the time. That these tariffs when so filed, and until changed in the manner prescribed by law, are binding upon carriers and shippers alike and hence upon the courts has long been settled.

Penn. R. R. Co. vs. International Coal Mining Co., 230 U. S. 184, 197;

American Sugar Refining Co. vs. Delaware, L. & W. R. Co., 207 Fed. 733, 739;

American Union Coal Co. vs. Penn. R. Co., 159 Fed. 278;

East Ohio Gas Co. vs. City of Cleveland, 106 O. S. 489, 512.

It will be further noted that Section 6 of the Interstate Commerce Act prohibits any carrier refunding or remitting in any manner or by any device any portion of the rates, fares and charges specified in its tariffs except such as are excepted in such tariffs. Similarly, Section 566 of the Ohio General Code provides that:

> "No railroad shall demand, charge, collect, or receive from a person, firm or corporation a less compensation for the transportation of property or for a service rendered or to be rendered by it in consideration of such person, firm or corporation furnishing a part of the facilities incident thereto; but nothing herein shall prohibit a railroad from procuring securities or services incident to transportation and paying a reasonable compensation therefor."

It is, therefore, plain that the carrier (defendant) was under both Federal and State laws obligated to charge and collect its published tariff rate and that it could charge and collect no more and no less. *Louisville & Nashville R. Co. vs. Mottley*, 219 U. S. 467, 477.

Any allowance to the plaintiff out of the through line-haul freight rate charged and legally in effect would *ipso facto* reduce the charge which the defendant was, under its tariff, compelled to collect. It is fundamental that one may not lawfully do indirectly what he cannot lawfully do directly and the courts will not lend their orderly processes to produce such a result.

A. J. Phillips Co. vs. Grand Trunk Western Ry. Co., 236 U. S. 662, 666, 667;

Texas & Pacific Ry. vs. American Tie & Timber Co., 234 U. S. 138, 148.

The courts being bound by the tariffs legally in effect may not compel the carrier to reduce its charge through an allowance to the shipper for this is the very evil that the Interstate Commerce Act was designed to meet.

Fulton Bag and Cotton Mills vs. American Railway Express Co., 288 Fed. 859;
Peavey & Co. vs. Union Pacific R. Co., 176 Fed. 409, 421.

The jurisdiction here invoked is essentially one of rate making vested in the Interstate Commerce Commission and the Ohio Public Utilities Commission.

The determination of the proper allowance to be made the shipper out of the line-haul rate would involve not only the determination of what constituted a reasonable allowance to the shipper but the making of a reasonable rate for the line-haul transportation service actually performed by the defendant; as the former must affect the latter. The exclusive jurisdiction of the Interstate Commerce Commission in the matter of rate making has long been established.

Loomis vs. Lehigh Valley R. Co., 240 U. S. 43;
A. T. & S. F. Ry. Co. vs. United States, 232 U. S. 199;
Mitchell Coal & Coke Co. vs. Penna. R. R. Co., 230 U. S. 247;
Texas & Pacific Railway Co. vs. Abilene Cotton Oil Co., 204 U. S. 426.

The *Loomis* case cited involved a similar question to that here raised. In that case a shipper requested cars suitable for transporting grain. In response the carrier sent ordinary box cars and refrigerator cars inadequate for the required service until fitted with inside doors or transverse bulkheads. The carrier in addition refused to

supply lumber with which to put the cars in condition to hold the grain. The shipper at much expense supplied the lumber and made the alterations to the cars. Since no prior application had been made to the Commission, it was held that the court had no jurisdiction to give a judgment for damages because the problem was one of rate making and thus one necessarily for the Commission. The position of the court was given in the opinion. To quote the court at page 48:

> "No serious dispute exists concerning the facts. The applicable duly-filed interstate rate schedules made no reference to allowances for grain doors or bulkheads, and the circumstances under which these were installed, together with their cost, are not controverted. Whether there was jurisdiction in the state court to pass upon the carrier's liability incident to the interstate traffic, is the sole point demanding consideration.
>
> "The effect of the Act to Regulate Commerce, as supplemented and amended, upon the jurisdiction of courts, has been expounded in many cases heretofore decided. *Tex. & Pac. Ry. v. Abilene Cotton Co.*, 204 U. S. 426; *Balt. & Ohio R. R. v. Pitcairn Coal Co.*, 215 U. S. 481; *Robinson v. Balt. & Ohio R. R.*, 222 U. S. 506; *Mitchell Coal Co. v. Penna. R. R.*, 230 U. S. 247; *Morrisdale Coal Co. v. Penna. R. R.*, 230 U. S. 304; *Minnesota Rate Cases*, 230 U. S. 352; *Tex. & Pac. Ry. v. American Tie Co.*, 234 U. S. 138; *Penna. R. R. v. Puritan Coal Co.*, 237 U. S. 121; *Penna. R. R. v. Clark Coal Co.*, 238 U. S. 456."

After reviewing the decisions just cited the court continues at page 50:

> "And adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs,

or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered. *In the last analysis the instant cause presents a problem which directly concerns rate-making and is peculiarly administrative. Atchison, Topeka & Santa Fe Ry. v. United States*, 232 U. S. 199, 220. And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. See *Penna. R. R. v. Puritan Coal Co., supra*, pp. 128, 129; *Penna. R. R. v. Clark Coal Co., supra*, pp. 469, 470.

"If in respect of interstate business the courts of New York may determine, as original matters, rate-making problems, those in other States have like jurisdiction. The uncertainty and confusion which would necessarily result, is manifest. Ample authority has been given the Commission, in circumstances like those here shown, to administer proper relief, and in connection therewith to approve some general rule of action. In so doing it would effectuate the great purpose for which the statute was enacted." (Italics ours)

If the courts are without jurisdiction to fix rates or practices in direct proceedings certainly they are without jurisdiction to fix them collaterally. See *Mitchell Coal & Coke Co. vs. Penna. R. R.*, 230 U. S. 247, 255.

The exclusiveness of the function of the Ohio Public Utilities Commission is similarly recognized.

East Ohio Gas Co. vs. City of Cleveland, 106 O. S. 489;

Socialist Co-operative Publishing Co. vs. American Express Co. et al., 13 Ohio Nisi Prius (N. S.) 403;

King Powder Co. vs. Charles S. Thrasher et al., 20 Ohio Nisi Prius (N. S.) 401.

The second of the three cases cited treats the question at length and in view of the affirmance of its holding by the Circuit Court on appeal the language used by the court is worthy of note. The following is quoted from pages 407 and 408 of the opinion:

> "By these acts (the act to regulate commerce and the railroad act of Ohio), within the jurisdictional province of each, it is made the duty of such companies to charge only just and reasonable rates. To that end, they are required to make and publish schedules to such rates and strictly adhere to them and not change them until authorized by the commission and all unjust preferences and discriminations therein are forbidden under heavy penalty. The commission, either federal or state, is endowed with plenary administrative powers to supervise the conduct of such companies, to investigate their affairs, their accounts and their methods of dealing, and generally to enforce the provisions of the act with the purpose, among others, of establishing a schedule of reasonable rates, having a uniform application to all, changeable only in the manner set forth in the act. With this view, the rule is based upon the ground that if any rate could be held to be discriminatory, unjust or unreasonable by a court, and the collection of the same in the future enjoined, as sought here, it would come to pass that some shippers might obtain relief upon this ground through the holding of some court or other and thus obtain a preference or discrimination refused to others not parties to such action. For, if without previous action of the commission, courts take jurisdiction generally to determine the reasonableness, etc., of any rate, it would follow that, unless all courts reached the same conclusion, no uniform schedule or standard could be maintained. The standard would fluctuate and vary, dependent upon the different conclusions reached by the various courts passing upon the question, and lead to the enforcement of one rate in one jurisdiction and a different one in another, and in many cases, to one fixed by the courts, and another by the

commission, in the same jurisdiction, and thus operate to destroy that uniformity and equality of rates which it was the very purpose of the act to establish. Such right in the courts is, therefore, inconsistent with the administrative power of the commission, to enforce this uniformity and equality of rates, and would render the enforcement of the act impossible.

"As a further reason for the conclusion reached that the commission has exclusive original jurisdiction of such matters, a court of review of the proceedings and judgments of the commission is provided for in both of said acts, with a provision for the change or modification of the schedule in accordance with the action of the court in that behalf."

Under the Interstate Commerce Act, allowances, such as here sought, must be published in the carrier's tariffs before an action may be maintained for their recovery.

The petition fails to state that any such allowance as there claimed was ever published in the tariffs of the defendant. Plaintiff in error contends at pages 19 and 20 of its brief that no such publication is necessary in that the charge for service which it seeks to recover is not an allowance within the meaning of the Act. Defendant in error believes that it has already demonstrated that the service for which an allowance is claimed is within the meaning of paragraph three of Section 1, paragraph seven of Section 6, and paragraph thirteen of Section 15 of the Act.

In *Fulton Bag and Cotton Mills vs. American Railway Express Co.*, 288 Fed. 854, an exactly similar service was held to be within Section 15 of the Interstate Commerce Act; and in fact the plaintiff in error admits at page 20 of its brief that the service for which an allowance is here sought is governed by that section. The amendment of Section 6 to require the publication of such allowances was the outgrowth of a report to Congress by the Commission

in 1905 on the situation existing generally as to allowances by carriers to shippers. The legislative changes in the Act resulting are stated in *Peavey & Co. vs. Union Pacific Railroad Co.*, 176 Fed. 409, at page 421, as follows:

> "Thereupon the Congress amended section 1 of the act so that it provides that transportation shall include 'all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration, icing, storing and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act, to provide and furnish such transportation upon reasonable request therefor.' 34 Stat. 584. Section 6, so that it provides that the schedules of rates required of the carriers shall 'state separately all terminal charges, storage charges, icing charges and all other charges which the commission may require, all privileges or facilities granted or allowed.' 34 Stat. 586. And Section 15, so that it provides: (Here the court quotes paragraph 13 of Section 15 cited as 34 Stat. 590)."

See also, *Interstate Commerce Commission vs. Diffenbaugh*, 222 U. S. 42, 44, 45.

It is plain, therefore, that the amendment of Section 6 to require the publication in the carrier's tariffs of allowances permitted under Section 15 was the intention of Congress in enacting these amendments. Furthermore, the law is settled that an allowance of this kind to be valid and recoverable must be published in the tariffs of the carrier. *Omaha Elevator Co. vs. Union Pacific R. Co.*, 249 Fed. 827. This case was decided by the Circuit Court of Appeals, 8th Circuit, and was a suit by the Elevator Company upon a contract to recover for services rendered in transferring through the plaintiff's elevator grain brought in over the line of the defendant railway. During a part of the period in question the railroad had in effect a tariff providing for the payment of an allowance on the basis provided for in

the contract, but on May 20, 1912, the defendant cancelled this tariff. In denying the plaintiff any recovery for the period subsequent to the cancellation of the tariff the court says at pages 832 and 833 of the opinion:

> "As to the third period, viz., subsequent to May 20, 1912, the record shows that, by action duly taken, the defendant's tariff in force prior to May 20, 1912, which covered these allowances, was cancelled as of that date, and no new tariff substituted covering such allowances.
>
> "The facilities furnished by plaintiff were within the terms of the act to regulate commerce. If there ever existed any doubt as to this, such doubt was removed by the Hepburn amendment. *Penn. Co. v. U. S.*, 236 U. S. 351, 362, 35 Sup. Ct. 370, 59 L. Ed. 616. *Unless the allowances were covered by a published and filed rate schedule, they could not legally be collected. Railway Co. v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501; *Railroad Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; *Elwood Grain Co. v. Railway Co.*, 202 Fed. 845, 121 C. C. A. 153.
>
> "These cases are not overruled nor modified by the *Arbuckle Case*, 231 U. S. 274, 34 Sup. Ct. 75, 58 L. Ed. 218. The question of filing a tariff by the railway company was not directly in issue nor passed upon in that case. It was conceded that the charges there under discussion were covered by a published tariff on file. This appears both from the opinion of the Supreme Court (231 U. S. 289, 296, 34 Sup. Ct. 79, 82 (58 L. Ed. 218), and also from the opinion of the Interstate Commerce Commission (*Federal Sugar Refining Co. v. B. & O. R. R. Co.*, 20 Interst. Com. Com'n R. 200). Furthermore, the *Kirby* case has been followed and approved in numerous decisions by the Supreme Court subsequent to the *Arbuckle* case. *Railway Co. v. Maxwell*, 237 U. S. 95, 97, 35 Sup. Ct. 494, 59 L. Ed. 853, L. R. A. 1915E, 665; *Railway Co. v. Prescott*, 240 U. S. 632, 638, 36 Sup. Ct. 469, 60 L. Ed. 836; *Railway*

Co. v. Blish Co., 241 U. S. 190, 197, 36 Sup. Ct. 541, 60 L. Ed. 948.

"The contention of counsel for plaintiff, that the right of recovery is *res adjudicata* by reason of the decree in *Peavy & Co. v. Union Pac. Ry. Co.*, (C. C.) 176 Fed. 409, cannot prevail. The allowances here sought to be recovered are for services in connection with transportation in interstate commerce, and, as above stated, they are within the purview of the act to regulate commerce. The allowances, though provided for in the first instance by contract between the parties, cannot be recovered, if at the time the services were rendered the provisions of the act to regulate commerce touching such allowances were not complied with. Both parties were bound to know what that act required, and whether compliance was being made. In the case of *Peavey & Co. v. Union Pac. Ry. Co., supra*, there was no suggestion made that the provisions of the act to regulate commerce requiring publication and filing of tariffs covering the charges in question had not been complied with, nor could such claim have been made in view of the facts. In the case at bar the situation is entirely different. The cancellation effective May 20, 1912, of the tariff containing these allowances, was a matter of record of which plaintiff was bound to take notice. What its remedies were is not necessary here to determine. It is clear that it could not go on rendering the services, and recover therefor the allowances which, though provided for in the contract, yet, by reason of existing circumstances, had come under the ban of the act to regulate commerce. *New Haven R. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 398, 26 Sup. Ct. 272, 50 L. Ed. 515; *Louisville & Nashville Ry. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; *Philadelphia, Baltimore & Washington R. R. Co. v. Schubert*, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911; *Elwood Grain Co. v. St. Joseph & G. R. Ry. Co.*, 202 Fed. 845, 121 C. C. A. 153; *Cudahy Packing Co. v. Ry. Co.*, 215 Fed. 93, 131 C. C. A. 401.

"It therefore follows that there could be no recovery for charges accruing during the third period." (Italics ours)

The charges here sought to be recovered to the extent that they are subject to the Act to Regulate Commerce cannot, therefore, be recovered in this action, not having been filed and published as required by Section 6 of the Interstate Commerce Act, and the fact that the parties may have provided for the said charges by contract is immaterial since such charges were under the ban of the Interstate Commerce Commission. *Omaha Elevator Co. vs. Union Pacific Railroad Co., supra.*

Plaintiff in error lays considerable stress upon the fact that an emergency in the nature of a strike existed during the period covered by its claim and that because of the nature of the emergency the ordinary rules of law which would otherwise be applicable requiring publication of the allowance in the carrier's tariff should not be here applicable. Both Section 508 of the Ohio General Code and Section 6 of the Interstate Commerce Act provide that ordinarily changes in the existing tariff schedules may only be made by the filing of new schedules at least thirty days prior to the time they are to take effect but in each instance both the Federal and State Commissions are authorized, upon good cause shown, to allow changes upon less than thirty days notice. The petition in this case shows that the emergency referred to, during which time it seeks to recover an allowance, existed from April 13, 1920, to September 30, 1920. It would appear, therefore, that ample time existed even during the period of the strike within which the tariffs might have been amended to provide for an allowance had the plaintiff in error been diligent in its efforts to protect the rights which it is now claiming. The plea of an emergency cannot, therefore, be given any weight in the disposition of this question.

The case of *Pennsylvania Railroad Co. vs. Puritan Coal Mining Co.*, 237 U. S. 121, cited and quoted from at length at pages 15 to 19 of plaintiff in error's brief is certainly not an authority in support of the plaintiff in error's contentions in this case, as that case was an action founded upon a violation by the carrier of its own rule duly promulgated. The court being called on to decide a mere question of fact as to whether the carrier had violated the rule to plaintiff's damage, necessarily no administrative action on the part of the Commission was necessary before such a suit could be maintained. Had this carrier (defendant) had in effect a tariff providing for an allowance in a definite sum and refused to accord plaintiff the benefit of that tariff the plaintiff here would have been in the position of the plaintiff in the case just cited and would have been entitled to maintain its action in court without first bringing his complaint before the Commission. *American Sugar Refining Co. vs. Delaware, L. & W. R. Co.*, 207 Fed. 733. But here there was no tariff rule in effect, the failure to observe which gave the plaintiff a right such as here sought. The plaintiff's action here is nothing more or less than one to determine and recover an allowance for transportation service performed by him, the reasonableness of which under Section 15 of the Interstate Commerce Act is to be determined by the Interstate Commerce Commission.

The case of *Illinois Central Railroad Co. vs. Mulberry Hill Coal Co.*, 238 U. S. 275, cited at page 19 of plaintiff in error's brief is not in point as the issue there raised was one based entirely upon a state statute requiring cars to be furnished on reasonable request. The opinion in that case when before this Court concludes as follows:

> "In this case, plaintiff made no attack whatever upon defendant's rules for car distribution. The declaration, indeed, is based wholly upon the statute, and contains no averment of discrimination."

Similarly, the case of *Kansas City Southern Railway Co. vs. Wolf*, 272 Fed. 681 (8th C. C. A.) is likewise not in point on the issues here involved as the case there merely involved the recovery of an over-charge where no question was raised as to the tariff.

Plaintiff in error in part three of its brief devotes some space to an argument that if the services performed by the plaintiff related exclusively to intrastate commerce then the district court had jurisdiction to determine and decide the questions presented by the plaintiff's petition and the Ohio Public Utilities Commission had no jurisdiction in the premises. This argument has already been answered in the early pages of this brief by showing that essentially the same rules of law apply to state as to interstate commerce in the State of Ohio. Consequently extended notice of plaintiff in error's argument will not here be given.

While it is true that the statute creating the Public Utilities Commission of Ohio contains no provisions similar to paragraph 13 of Section 15 of the Interstate Commerce Act, nevertheless we believe that we have demonstrated that the plaintiff in error's cause of action is in reality nothing more or less than one to secure a refund of a portion of the tariff rate charged, which we have shown is clearly illegal.—Sections 510 or 566 of the Ohio General Code. Furthermore, any adjudication of an allowance would involve the determination of the rate for the line-haul of the defendant carrier which we have shown is exclusively the function of the Public Utilities Commission under the Ohio General Code. The only inference which may be drawn from the comparison of Section 15 of the Interstate Commerce Act and Section 566 of the Ohio General Code at page 26 of plaintiff in error's brief is that, on the face of it, the Ohio General Code does not require the publication of tariff form of the allowance here sought by the

plaintiff in error. Certainly it affords no ground for concluding that the Public Utilities Commission has no jurisdiction over a matter, which we have shown, is one of rate making.

The case of *Baltimore & Ohio Railroad Co. vs. Armstrong, Lee & Co.*, 99 O. S. 163, shows on its face that it is not applicable to the issues here raised. Plaintiff in error seeks to extend the wording of this decision to include all contracts without reference to whether they were otherwise prohibited by law. We have already demonstrated that such an allowance as is here sought would result in the collection of a less rate than provided in the tariffs of the carrier lawfully on file. The defendant in error has already shown that such action would be a clear violation of the statute heretofore cited.

In view of the references made by the plaintiff in error to the case of this same plaintiff in error against the Wheeling and Lake Erie Railway Company decided in the Common Pleas Court of Cuyahoga County, No. 226,801, the defendant in error feels obliged to correct some of the inferences naturally following from the statements of plaintiff in error appearing at pages 30 and 31 of its brief.

The facts are these. The motion in this case, together with that in the case of *Thomas P. Goodbody, as Receiver of The Hydraulic Steel Company vs. The Wheeling and Lake Erie Railway Company*, No. 226,639, was argued in December, 1924, before Common Pleas Judge Newcomb, whose term was due to expire on December 31, 1924. Upon the conclusion of the argument Judge Newcomb stated that in view of the pendency of the Pennsylvania cases in the Federal District Court, he would recommend to Chief Justice Powell of the Common Pleas Court that rulings on the motions in the two cases against The Wheeling and Lake Erie Railway Company be reserved until the dis-

position of the question in the Pennsylvania cases in the District Court. This recommendation was approved by the Chief Justice, but was not entered on the docket, and the motions were referred to Common Pleas Judge McMahon who, on January 23, 1925, made the entry therein "Motion by defendant to dismiss action. Motion overruled. Defendant excepts." Promptly thereafter attorneys for The Wheeling and Lake Erie Railway Company called to Judge McMahon's attention the recommendation to Judge Newcomb and its approval by Chief Justice Powell, and he thereupon made the following entry in The Wheeling and Lake Erie Railway Company cases, "Federal case pending. Re-hearing if necessary." In view of the fact that the Federal cases have remained pending since that date, no re-hearing has yet been held on th motions in the Common Pleas cases and these cases, by consent of attorneys for both parties, have been passed from time to time.

In view of this explanation of the situation the defendant in error submits the disposition made of the case by the Common Pleas Court can have no weight in the decision of the issue before this Court.

In view of the foregoing arguments the defendant in error submits that the finding of the District Court should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 168 and 178.—October Term, 1926.

The Timken Roller Bearing Company, Plaintiff in Error, 168 *vs.* The Pennsylvania Railroad Company, Defendant in Error.	In Error to the District Court of the United States for the Northern District of Ohio.
Thomas P. Goodbody, as Receiver of the Hydraulic Steel Company, Plaintiff in Error, 178 *vs.* The Pennsylvania Railroad Company, Defendant in Error.	

[April 18, 1927.]

Mr. Chief Justice Taft delivered the opinion of the Court.

These two cases are exactly alike, and the same disposition will be made of them. They were dismissed at this term for lack of jurisdiction, as follows:

"Dismissed for lack of jurisdiction in this Court on the authority of Transportes Maritimes Do Estado *v.* Almeida, 265 U. S. 104, 105, and Oliver American Trading Company *v.* Government of the United States of Mexico, 264 U. S. 440, 442."

This is a motion to set aside the dismissals and to substitute therefor orders transferring them to the Circuit Court of Appeals for the Sixth Circuit.

The Timken Roller Bearing Company is a corporation of Ohio engaged in the business of making roller bearings and other steel products, with its principal place of business in Canton, Stark County, Ohio. The Pennsylvania Railroad is a corporation of Pennsylvania and a common carrier engaged in Ohio, and carried

freight for the Timken Company. The Timken Company sued the Pennsylvania Company, averring the following facts:

On April 10, 1920, the yard employees of the Pennsylvania Company struck. That Company notified the Timken Company that it would be unable to switch freight cars for it from the Pennsylsylvania's interchange tracks to the customary delivery of the Timken plant at Canton, Ohio. The Pennsylvania Company then provided the Timken Company with a yard locomotive, and from April 13, 1920, to about September 30, 1920, the Timken Company, with the knowledge and consent, and at the request of the Pennsylvania Company, did the switching service itself. The Pennsylvania Company made to the Timken Company its customary charges for such switching service at its regular freight rates, which the Timken Company paid. During that period the Timken Company switched 1640 freight cars for the Pennsylvania Company, the reasonable value of which service was $6,534.61. This amount was included in the line haul freight charges paid by the Timken Company to the Pennsylvania Company. The Pennsylvania Company was thus unjustly enriched in the amount above stated, and the Pennsylvania Company owed to the Timken Company the reasonable value of the service as stated.

The suit of the Timken Company was brought in the Common Pleas Court of Cuyahoga County, Ohio, and removed by the Pennsylvania Company on the ground of diverse citizenship to the United States District Court for the Northern District of Ohio. In that court the Pennsylvania Company filed a motion to dismiss for lack of jurisdiction, on the grounds:

(a) That the matters complained of in the plaintiff's petition essentially involved the making of a rate, as to which the District Court had no power;

(b) The subject affected the reasonableness of rates and the reasonableness of a practice in interstate commerce, which were administrative questions, confided primarily to the Interstate Commerce Commission, and there was no allegation in the plaintiff's petition that the Interstate Commerce Commission had prescribed any rule, rate or practice which would regulate, control or govern the rights or obligations of the plaintiff and defendant in the matter complained of;

(e) That to compensate the plaintiff for the expense of the switching service set forth in plaintiff's petition would be tantamount to giving him a rebate, contrary to law.

The motion to dismiss was sustained by the District Court on the ground that the question presented by the plaintiff's petition was an administrative and not a judicial question and that exclusive jurisdiction to hear and determine the matters complained of was vested in the Interstate Commerce Commission. The District Court therefore dismissed the petition solely for want of jurisdiction and under the provisions of section 238 of the Judicial Code of the United States as it stood at the time, January 30, 1925:

"Appeals and writs of error may be taken from the District Courts, including the United States District Court for Hawaii, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the Court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision. . . ."

made the following certificate:

"This Court by its final order dismissed the suit solely for want of jurisdiction.

"This certificate is made conformably to Judicial Code, Section 238, and the opinion filed herein is made a part of the record and will be certified and sent up as a part of the proceedings, together with this certificate."

Thereupon a writ of error from this Court to the District Court was allowed by the District Judge.

When the case was argued here in open court, this Court ordered the dismissal of the writ of error as above, for the reason that the question of jurisdiction passed on by the District Court in this case was not such a question as was covered by section 238. As interpreted by repeated decisions of the Court, such a question is in issue only when the District Court's power to hear and determine the cause as defined and limited by the Constitution or statutes of the United States is in controversy and where a district court is vested with jurisdiction of a cause, as where diversity of citizenship exists, and the matter in controversy is of the requisite value, the question whether it has the power to afford the plaintiff a particular remedy does not present a jurisdictional issue. *Smith* v. *Apple*, 264 U. S. 274, 278; *Oliver Trading Company* v. *Mexico*, 264 U. S. 440, 442; *Transportes Maritimes Do Estado* v. *Almeida*,

265 U. S. 104, 105. In this case there was no question about the jurisdiction of the Court, for there was diverse citizenship and the value of the matter in controversy was of requisite amount. The real question was whether in the absence of an administrative decision by the Interstate Commerce Commission, the plaintiff had a cause of action. See *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285. It went to the merits and not to the jurisdiction, and therefore this Court had no jurisdiction by writ of error under section 238 to consider the case.

The issue now made is whether this Court made the proper disposition of the cause by dismissing it, in view of the amendment by Act of Congress of September 14, 1922, to section 238 of the Judicial Code, called section 238 (a), c. 305, 42 Stat. 837, as follows:

"If an appeal or writ of error has been or shall be taken to, or issued out of, any circuit court of appeals in a case wherein such appeal or writ of error should have been taken to or issued out of the Supreme Court; or if an appeal or writ of error has been or shall be taken to, or issued out of, the Supreme Court in a case wherein such appeal or writ of error should have been taken to, or issued out of a circuit court of appeals, such appeal or writ of error shall not for such reason be dismissed, but shall be transferred to the proper court, which shall thereupon be possessed of the same and shall proceed to the determination thereof, with the same force and effect as if such appeal or writ of error had been duly taken to, or issued out of, the court to which it is so transferred."

There is no doubt that under this section if it applies to the present case, the motion to dismiss should not have been granted as it was, but the case should have been transferred to the Circuit Court of Appeals for a review of the issue on the merits as to the cause of action set up by the Timken Company in its petition.

The motion now made to set aside the dismissal and enter an order of transfer is resisted by the attorneys for the Pennsylvania Company, on the ground that section 238 (a) does not now apply to the present case. This suit was filed in the Common Pleas Court of Cuyahoga County on May 31, 1924, and was removed to the United States District Court for the Northern District of Ohio June 30, 1924, and upon the defendant's motion was dismissed by the District Court for lack of jurisdiction, the judge's certificate to that effect being filed January 30, 1925. The writ of error was

allowed by the District Court on April 6, 1925, was issued on that date and served upon the defendant in error April 18, 1925—all before the taking effect of the Act of February, 1925 on May 13, 1925. The return on the writ of error was transmitted by the Clerk of the District Court on July 3, 1925, the transcript of record being filed on July 13, 1925.

The Act of September 14, 1922, section 238 (a) was expressly repealed by the Act of February 13, 1925, section 13, 43 Stat. at Large, 942. Section 14 provides that the Act "shall take effect three months after its approval, but shall not affect cases then pending in the Supreme Court, nor shall it affect the right to a review or the mode or time for exercising the same as respects any judgment or decree entered prior to the date when it takes effect." The defendant contends that section 14 can not be construed to continue the effect of section 238 (a) of the Act of September 22, 1922, because section 14 only saves cases then pending in the Supreme Court, that as this Court has now found it had no jurisdiction of the writ of error issued by this Court to the District Court, it can not be said that it was a case pending in this Court and therefore did not come within the saving clause, and that the order dismissing the case for lack of jurisdiction must stand. We think that this is much too narrow a construction of the saving provision of section 14. A writ of error duly issued by a judge having authority to issue writs of error from this Court to the District Court of the United States, in a case there pending, even though the writ of error is erroneously issued, is, when the writ is executed and the record brought here, to be regarded as having been a case pending in this Court from the allowance and issuing of the writ of error and as then removed from the control and jurisdiction of the District Court—and to continue as such for the purposes of section 14 until the writ of error is dismissed. The effect of section 14, therefore, is to impose on this Court the duty of granting the transfer to the Circuit Court of Appeals if that is the court, as it is, to which this case should have been taken on error. The previous dismissal of the case is set aside and the transfer of the case to the Circuit Court of Appeals for the Sixth Circuit is ordered.

A similar order will be made in the case of Goodbody *v.* The Pennsylvania Company, No. 178.